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Pennsylvania Justices' Law Reporter

CONTAINING

CASES DECIDED IN THE COURTS OF THE SEVERAL
COUNTIES OF PENNSYLVANIA, AFFECTING JUS-
TICES OF THE PEACE, ALDERMEN, MAGIS-
TRATES, BURGESSES AND ALL OTHER
COUNTY AND TOWNSHIP
OFFICIALS.

o

VOLUME VII

ALBERT R. PLACE

FORRISTOWN, PA.

1909

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PENNSYLVANIA
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Published monthly and containing the latest decisions affecting the jurisdiction and practice of Justices of the Peace, Magistrates and Aldermen, as also those matters concerning which they may from time to time be consulted, together with the decisions of the several courts of the State of Pennsylvania, affecting state, county, township and borough officials, in their official capacity.

Farewell v. Joranson

Where, in an action pending, defendant, by permission of the Court, under the Act of March 12, 1867, P.L. 35, paid money into Court, which plaintiff refused to accept, and subsequently, in open Court, after the jury had been sworn, in the presence of plaintiff and his counsel, the Court permitted defendant to take the money out of Court, objections and exceptions to this order, are filed after judgment is entered in favor of defendant on a verdict of the jury, and after Court had adjourned for the term, are too late.

ORDER PERMITTING PARTY TO TAKE MONEY OUT OF
COURT—EXCEPTIONS—LACHES.

No. 137, January Term, 1906, C.P. of Clinton County.

Rule for New Trial.

C. S. McCormick, Attorney for Plaintiff.

Brown & Stevenson, Attorneys for Defendant.

Opinion by Hall, P.J., April 20, 1908.

OPINION.

The first and second reasons for granting a new trial, which have been filed on the part of the plaintiff, are to

Farewell v. Jorison.

the effect that the Court erred in allowing the defendant to prove that the plaintiff had not carried out his contract and the consequent damages ensuing therefrom. It requires no citation of authorities to justify the decision that there is no merit in this contention.

The third reason states that "on August 13, 1906, the Court granted defendant leave to pay into Court the sum of one hundred and ten 58-100 dollars, which money was paid into the hands of the Prothonotary; on February 1, 1908, the Court, without leave granted an order to the defendant on the Prothonotary to pay the money in Court back to the defendant without the knowledge of the plaintiff, to which action of the Court and the return of the money plaintiff excepts and objects as contrary to his rights under the law." This case came up on an appeal from the judgment of an alderman, who rendered a judgment in favor of the plaintiff November 3, 1905, for ninety-two 45-100 dollars. The appeal was taken by the plaintiff, not by the defendant, and the transcript was filed in this Court, January 5, 1906. On August 13, 1906, the defendant applied for leave to pay into Court the sum of one hundred and ten 58-100 dollars, which was the amount of the judgment before the alderman, with interest and costs, up to the date of application. This application was made under the provisions of the Act of 12 March, 1867, P.L. 35, and was granted by the Court as a matter of course to which action of the Court the plaintiff took an exception. During the preparation of his case for trial in this Court the defendant doubtless discovered that he had a complete defence to the whole of the plaintiff's claim, and when the case came on for trial, he made application for leave to withdraw his tender, which was granted

Farewell v. Jornson.

by the Court. Perhaps the Court's action was taken "without leave," as stated in the plaintiff's third reason for a new trial, above quoted. We do not know whose leave we should have asked and we have not been enlightened in this respect on the argument of the rule.

The third reason referred to states that the tender was withdrawn and the order made on the Prothonotary to return the money to the defendant without the knowledge of the plaintiff. This may be. We have no disposition to contradict the plaintiff's sworn statement, but the application was made after the jury in the case had been sworn, in open Court, and in the presence of both the plaintiff and his counsel, and it was not granted until the Court had given the plaintiff's counsel another opportunity to accept the tender and to discontinue further proceedings. No exception was taken at the time to the order of the Court, allowing the tender to be withdrawn. After judgment had been rendered in favor of the defendant, on Saturday, February 1, and the Court had adjourned for the term, the plaintiff's counsel, on Monday, February 3, obtained the order from the files and endorsed upon it the following: "Now, February 3, 1908, plaintiff, by his counsel objects and excepts to the above order and prays the Court to sign and seal a bill of exceptions." This was mailed to the President Judge, who refused to allow an exception on the ground that the application came too late, and should have been made before judgment. There is no doubt in our mind that if the verdict of the jury had been in favor of the plaintiff, and for a greater amount than the amount tendered, the plaintiff would have claimed the right to collect all of the costs of the trial, and he would have had a right to do so, but

Farewell v. Joranson.

he cannot abide the event of the suit, and in case he is successful, claim that the money is not in Court, or in case he is unsuccessful, claim that it is there.

The evidence on the trial was so overwhelmingly in favor of the defendant that had the verdict been otherwise than in favor of the defendant we should have had no hesitation in setting it aside. The evidence on the trial showed deliberate dishonesty and bad faith on the part of the plaintiff, so far as his relations with the defendant were concerned, and his present claim, in our judgment, shows the same disposition toward the Court.

The cases cited by him have no application. They are all cases where the tender was kept up until after judgment was rendered, and none of them show leave of Court to withdraw the tender granted before judgment. In all of them the money paid into Court was submitted to the jury and taken into consideration by them in making up their verdict. In the present case no reference was made to the tender, either in the evidence or in the pleadings, nor was it submitted to the jury in the charge of the Court; consequently, it could not have influenced the verdict of the jury or have been taken into consideration in their deliberations.

The rule for new trial is discharged.

Reported by W. C. Kress, Lock Haven, Pa.

Commonwealth v. McComb

It is within the power of the Legislature to regulate the manner of taking game, but, in doing so, it must not discriminate in such a way as to produce injustice to individuals.

A statute which prohibits the killing of game with automatic guns and permits it to be killed with all other kinds of guns is a discrimination against the makers of automatic guns, and deprives them of the equal protection of the laws.

The Act of May 31, 1907, P.L. 329, prohibiting the use of automatic guns for the killing of game or wild birds is unconstitutional. It offends against both the Constitution of the United States and the Constitution of Pennsylvania.

CONSTITUTIONAL LAW — GAME LAWS — AUTOMATIC GUNS—ACT OF MAY 31, 1907—CONSTITUTION OF THE UNITED STATES, 14TH AMENDMENT—CONSTITUTION OF PENNSYLVANIA, ART. I, SECT. I, AND ART. III, SECT. 7.

Quarter Sessions Delaware County.

Appeal from Summary Conviction.

William I. Schaffer, for Appellant.

Josiah Smith, Contra.

Opinion by Broomall, J., April 25, 1908.

The defendant was charged with killing a wild duck with an automatic gun, in violation of the provision of the Act of May 31, 1907, P.L. 329, and was summarily convicted before an alderman of the City of Chester, and sentenced to pay a fine of \$50, or to be imprisoned for fifty days. An appeal to the Quarter Sessions was allowed.

William I. Schaffer, for the Appellant.—The Act is unconstitutional; *Barbier v. Connolly*, 113 U.S. 27; Con-

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nolly v. Union Sewer Pipe Co., 184 U.S., 540; Lawton v. Steele, 152 U.S., 133 ;Holden v. Hardy, 169 U.S., 366; Matter of Jacobs, 98 N.Y., 98; Pumpelly v. Green Bay Co., 13 Wall., 166; Wynehamer v. People, 13 N.Y., 378; People v. Otis, 90 N.Y., 48; Richmond Safety Gate Co. v. Mayor of Philadelphia, 11 District Reps., 342; Com. v. Zacharias, 181 Pa., 126; State v. Gardner (Ohio), 41 L.R.A., 689; In re Marshall, 102 Fed. Repr., 323.

Josiah Smith, Contra.

OPINION.

The defendant was arrested, taken before Robert Smith, an alderman of the City of Chester, charged with violating the provisions of the following Act of Assembly of this Commonwealth.

He was, after hearing, convicted and sentenced to pay a fine of \$50 or suffer imprisonment for fifty days.

The statute is as follows: "Section 1. Be it enacted, that from and after the passage of this act, it shall be unlawful for any person to use what is commonly known as an automatic gun for the killing of game in this Commonwealth. Each and every person violating any provision of this section shall be liable to a penalty of \$50 for each offence, or shall suffer an imprisonment in the common jail of the county for a period of one day for each dollar of penalty imposed.

"Section 2. Each and every magistrate, alderman and justice of the peace within this Commonwealth shall have the right of summary conviction in all matters pertaining to a violation of any of the provisions of this act, and all prosecutions for violation of any of its provisions

Commonwealth v. McComb.

shall be conducted and the penalties disposed of in manner and form as is now prescribed by law for violation of the game laws of this Commonwealth."

He appealed (after leave of Court).

His defence is that the fine was illegally imposed, because the act is in derogation of the 14th Amendment to the Constitution of the United States, which declares: "Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

He also contends that it is in violation of Section 1, Art. 1, of the Constitution of Pennsylvania, which is as follows: "All men . . . have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation and of pursuing their own purpose."

Also of Section 7, Art. 3, of said Constitution, which prohibits the General Assembly from passing any law "granting to any individual any special or exclusive privilege or immunity."

There is no doubt of the right of the Legislature to regulate the manner of taking game, but in doing so, it must not discriminate in such a way as to produce injustice to individuals.

The statute prohibits the killing of game with automatic guns, and permits it to be killed with all other kinds of guns.

Commonwealth v. McComb.

This is a discrimination against the makers of automatic guns and deprives them of the equal protection of the laws guaranteed by the Constitution of the United States and the Constitution of Pennsylvania.

The defendant is discharged.

—From The Weekly Reporter, Chester, Pa.

Shenk v. Kurtz, Attorney, and Vogel, Constable

An amendment may be allowed striking off the name of one of two plaintiffs and substituting a new statement in a replevin suit for goods levied on under a landlord's warrant where a counter bond was filed and the goods were retained by the defendant, and the amendments can not prejudice the defendant.

LANDLORD'S WARRANT—REPLEVIN—AMENDMENT.

No. 46, September Term, 1905, C.P. of Lancaster County.

Rules to amend caption and pleadings and substitute a new statement.

B. F. Davis and E. M. Hershey, Esqs., for Rules.

D. McMullen, Esq., Contra.

Opinion by Landis, P.J., March 28, 1908.

OPINION.

On September 6, 1905, M. H. Shenk and A. M. Shenk, as plaintiffs, through their attorney, caused a writ of replevin to issue against Samuel Kurtz, Attorney for Norman K. Grissinger, and George S. Vogel, Constable, for two bedroom suites, four carpets, one parlor suite, lounge, writing desk, two sinks, one dozen chairs, one range, two tables, oilcloths, and other goods on the premises of plaintiffs in the Borough of Mount Joy. Bail was fixed in the *praecipe* at eighty dollars; and, at the same time, M. H. Shenk made an affidavit that the goods claimed were of the value of one hundred dollars and the rent due forty dollars. M. H. Shenk, at the same time signed a bond for eighty dollars, with C. N. Mumma as surety. A. M. Shenk never signed the replevin bond;

Shenk v. Kurtz, Attorney, and Vogel, Constable.

but whatever informality there may be in this regard is now of no importance.

On September 11, 1905, George S. Vogel gave a counter-bond, with Joseph R. Strickler as surety, in the sum of eighty dollars, and retained possession of the property, and the same was afterwards sold by the Sheriff for the payment of rent due. On February 27, 1907, the plaintiffs filed their statement, claiming damages in the sum of one hundred and fifty dollars, and on February 22, 1908, on a petition of Annie M. Shenk, a motion was made to strike out the name of M. H. Shenk as plaintiff, and leave was asked to withdraw the former statement, and to substitute another in lieu thereof in the name of Annie M. Shenk.

If, in this case, the goods had been delivered to the plaintiff and the defendants' remedy was upon the bond which was filed at the time the writ of replevin issued, we would feel loath to grant the amendments prayed for in this suit. The rights of the defendants might be prejudiced thereby, and therefore the parties should be left in the position in which they placed themselves. But, as has been already said, it appears in the case that the goods were retained by George S. Vogel, one of the defendants, and were ultimately sold by the Sheriff, and their proceeds appropriated towards the payment of the rent.

The bond filed by the plaintiffs is, therefore, not a serious factor in the case. That being so, we do not see what particular harm can be done by granting the amendments and allowing the parties to contest the issue concerning the title to the property and the rightfulness of the distraint made.

Shenk v. Kurtz, Attorney, and Vogel, Constable.

By the Act of May 4, 1852, Sec. 2, P.L. 574, it is provided "that all actions pending, or hereafter to be brought in the several Courts of this Commonwealth, and in all cases of judgments entered by confession, the said Courts shall have power, in any stage of the proceedings, to permit amendments by changing or adding the name or names of any party, plaintiff or defendant, whenever it shall appear to them that a mistake or omission has been made in the name or names of any such party." "The general rule on this subject is, that no amendment can be allowed, the effect of which is to introduce a new cause of action so as to deprive the opposite party of a valuable right or to injuriously affect the intervening rights of third parties: *Strock v. Little*, 33 Pa., 409; *Leeds v. Lockwood*, 84 Pa., 70; *Duffey v. Houtz*, 105 Pa., 96; *Grier Brothers v. Assurance Co.*, 183 Pa., 334." *Wilkinson v. North East Borough*, 215 Pa., 486. But an amendment of the record may be made, so as to make it conform to the facts of the case, when such amendment is not prejudicial to any one's rights. *In re Road in North Franklin Township*, 8 Sup., 358.

The rule is, therefore, made absolute, and the amendments are allowed as prayed for.

—From the Lancaster Law Review.

Leaman, et al. v. Lancaster County Mutual
Insurance Company

The proceedings of an alderman will be set aside on certiorari, where it appears that the summons was not served by the constable of the township where the defendant company had its office, although the constable's costs endorsed on the writ were the same as the constable of the said township would have been entitled to.

A justice can amend a constable's return in accordance with the facts, but he should note on the return that it was amended by him.

JUSTICES OF THE PEACE—SERVICE OF SUMMONS—CONSTABLES' COSTS—ACT OF MARCH 20, 1810, SEC. 48,
5 SM. L. 162.

May Term, 1908, No. 49, C.P. of Lancaster County.

Certiorari.

Chas. W. Eaby, Esq., for Certiorari.

E. M. Gilbert Esq., Contra.

Opinion by Hassler, J., June 27, 1908.

OPINION.

The first and second exceptions to the justice's record are to the effect that the summons was not issued to the constable of the township where defendant resides, which in this case is where its office is located, nor to the next constable most convenient. That this is a fact is clearly shown by the depositions.

The Act of 20 March, 1810, 5 Smith L. 162, Sec. 48, provides that a justice must direct a summons "to the constable of the township, ward or district where the defendant usually resides or can be found, or to the next constable most convenient to the defendant." The defendant

Leaman, et al., v. Lancaster County Mutual Insurance Co.

in this case is an insurance company having its office in Paradise Township, Lancaster County. The constable to whom the summons was issued lives in the third ward of Lancaster City. There is a constable residing in Paradise Township, and a number very much more convenient to the defendant's office than the constable to whom the summons was directed. The defendant did not appear at the hearing. Under such circumstances it has been frequently decided that the justice does not acquire jurisdiction. The last case on this subject, in which others are cited, is one of this court—Yost v. Yost, No. 1, 25 L.L.R. 54. In that case as well as in others, it is stated that the reason for the Act of Assembly is that the defendant might be put to large and unnecessary costs if the subpoena was given to a constable residing at a great distance from his residence and this appears to have been understood by counsel for the plaintiff as well as the justice to mean that if the costs are the same as they would be if the summons had been directed to the proper constable, the Act does not apply. This is a mistaken view of the law, and under no circumstances can he direct a summons to any but to those designated.

The constable's costs, as appears on the return, are the same as those which the constable of Paradise Township would have been entitled to. This, however, does not include the constable. If we should confirm the justice's proceedings the constable could have all the fees he earned in serving the summons made part of the costs, and the same would have to be paid before the judgment could be satisfied. We mention this to show that even though the law is, as understood by the justice, there is nothing on the record or before the Court to show that the defendant

Leaman, et al., v. Lancaster County Mutual Insurance Co.

would not be subjected to greater costs by reason of the summons having been directed to a constable other than one of those designated in the Act of Assembly. In *Yost v. Yost*, No. 2, 25, L.L.R., 54 we decided that the Act of 1810 is not repealed by the Act of July 9, 1901, P.L. 16.

We are of the opinion that the return of service complies with the Act of Assembly, and that the justice could amend the return of the constable in accordance with the facts at any time, if he did do so, as is alleged by counsel for defendant. The proper way would have been for him to have noted on the return that it was amended, by changing it or adding to it, in accordance with the facts, but so long as the return has only been changed to agree with the facts, the defendant suffers no harm by the amendment, and it was within the powers of the justice to make it. The third and fourth exceptions are therefore without merit, and we dismiss them.

The first and second exceptions we sustain, and the proceedings of the justice are set aside.

—From the Lancaster Law Review.

Clement M. Orr v. H. E. Baltzell

In a certiorari, an exception in the following words, being too general, will not be allowed: "For defects apparent on the face of the record itself."

Where the exception states that the defendants were not properly summoned, the Court will not take judicial notice of the same, if the return of the constable is under oath and shows a service in exact accordance with the requirements of the Act of Assembly.

The Common Pleas cannot, on certiorari, reverse a judgment rendered more than twenty days previous to the suing out of the writ, even if it does not appear from the record that the summons was served, the judgment being rendered without hearing and by default.

RECORD—EXCEPTIONS—C.P. TAKING JUDICIAL NOTICE
—SUMMONS—SERVICE OF—CONSTABLE—JUDGMENT
BY DEFAULT.

No. 60, March Term, 1908, C.P. of Montgomery Co.

Certiorari to J.P.

Henry M. Tracy, Attorney for Plaintiff.

P.P. for Defendant.

Opinion by H. K. Weand, J.

EXCEPTIONS.

1st. For defects apparent on the face of the record itself.

2d. That said defendants were not properly summoned.

3d. That the return of the summons thereon was not properly made.

OPINION.

The suit was brought against husband and wife before a Justice of the Peace for work and labor done and material furnished, etc.

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Service was not had on the wife, but after a hearing, at which the husband was present, judgment was given against both defendants. A certiorari was issued when plaintiff discovered the irregularity of the judgment against the wife, and presented his petition to the Court to have the same stricken off as against the wife, which, after notice to defendant, was done.

The exceptions filed are as follows, viz:

1. "For defects apparent on the face of the record itself."
2. "For that defendants were not properly summoned."
3. "That the return of summons therein was not properly made."

As to first exception, the answer is that "a general exception will not be allowed on certiorari."—*Neelis v. McKeown*, 6 Phila., 310, per Brewster, J.

As to second and third exceptions, the return of the constable is under oath and there is a service on the husband in exact accordance with the requirements of the Act of Assembly.

If we confine ourselves, therefore, to the exceptions filed, we must dismiss them and affirm the judgment which is now against the husband alone.

The justice had jurisdiction of the subject matter, and if the fact of non-service against the wife had been called to his attention, the suit could have been amended so as to proceed against the defendant served, alone. The defendant was present at the hearing. Judgment was given January 3, 1908, but certiorari not issued until January 30, 1908. No reason or excuse has been offered for the delay.

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In 1 Ashmead, 135, King, President, held that "the Common Pleas cannot, on certiorari, reverse a judgment rendered more than twenty days previous to the suing out of the writ, even if it does not appear from the record that the summons was served, the judgment being rendered without hearing and by default."

And now, June 1, 1908, the exceptions are dismissed and the judgment of the justice is affirmed.

Blackwell v. Pelican Mutual Life
Insurance Company

A constable has no authority to serve a summons on a life insurance company or other corporation beyond the limits of the county for which he is elected.

CERTIORARI—JUSTICE OF THE PEACE—LIFE INSURANCE COMPANY—CORPORATIONS—SERVICE OF PROCESS OUTSIDE OF COUNTY—ACTS OF 24 APRIL, 1857, P.L. 318; 8 APRIL, 1868, P.L. 70; 13 MAY, 1889, P.L. 198; 9 JULY, 1901, P.L. 616, AND 3 APRIL, 1903, P. L. 139, CONSTRUED.

C.P. Delaware County.

Certiorari to Justice of the Peace and exceptions to the record.

A. B. Geary, Esq., for Exceptions.

Wm. B. Northam, Esq., Contra.

Opinion by Broomall, J., May 4, 1908.

OPINION.

The record of the Alderman in the above stated case discloses that a summons was issued on May 24, 1907, returnable May 31, 1907, between the hours of 9 and 10 o'clock a. m., and the service of the summons was made by Thaddeus Shinkel, Constable of Chester, on May 27, 1907, on the Pelican Mutual Life Insurance Company, of Philadelphia, for its Protective Branch, by handing a true and attested copy thereof to Joseph H. Conway, general manager, at his office in Philadelphia, personally. The defendant did not appear, and judgment was rendered publicly against the

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defendant by default and in favor of the plaintiff on May 31, 1907, immediately after 10 o'clock a.m. This certiorari was issued on June 8, 1907, and in obedience thereto the record of the Alderman was duly returned.

Exceptions to the record were filed by the defendant on June 25, 1907, as follows:

1. The record shows that the summons was served in the City and County of Philadelphia by Thad. Shinkel, a constable of the City of Chester, in the County of Delaware aforesaid. Said constable had no authority to serve said writ in said County of Philadelphia.

2. The return of service does not show that there was no employee, officer or director of said defendant within the County of Delaware upon whom the writ could have been served at the time of service in Philadelphia.

The question raised by the exceptions is whether the summons in the above case was served on the defendant according to law. If it was, the judgment is good. If it was not, then the Alderman did not have jurisdiction of the defendant, and the judgment rendered against it is invalid.

Primarily the jurisdiction of an Alderman or ex-officio Justice of the Peace is restricted to his county and his process cannot be served by the constable of his county, his executive officer, unless legal authority for such service appears. We are, therefore, turned to the inquiry for the law under which the constable in this case served the summons in Philadelphia. It may be fairly inferred that the defendant is a corporation, and it may further be fairly inferred that this corporation is a life insurance company. This much is disclosed by the name of the defendant.

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By the Act of April 24, 1857, P.L. 318, a person may bring suit against any insurance company in any county where the property insured may be located, and the process in such suit may be directed to the Sheriff of any of the counties in the State. Such process may be served upon the President, or other chief officer of the insurance company, or upon the agent of such company in the same manner as other process is served.

Under this Act of 1857 it was considered very doubtful if it was applicable to life insurance companies, and this because of the phraseology "in any county where the property insured may be located." Accordingly an Act was passed on April 8, 1868, P.L. 70, Stewart's Digest, page 1982, Note E, which extended the provisions of the Act of 1857 to life and accident insurance companies. The law, as thus established by the Acts of 1857 and 1868, were only applicable to suits in Court, and they contemplated not that the process shall be served by the Sheriff of the county where the writ issues, but on the contrary, they contemplated that the writ may be directed to and served by the Sheriff of any county, who can make service of it upon the defendant within his jurisdiction.

The Act of 1857 was the subject of further extension by the Act of May 13, 1889, P.L. 198, Stewart's Digest, page 1982, pl. 178. This Act is in the same words as the Act of 1857, with such additions as to make it applicable to process issued by a Justice of the Peace, Alderman or Magistrate. It is in these words: "That in addition to the remedies now provided by law, it shall be lawful for any person or persons, body politic or corporate, who may have a cause of action against any insurance company incorporated by the Legislature of this Commonwealth, or

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against any insurance company that may have an agency established in this Commonwealth, to bring suit in a Court of Common Pleas, or before any Justice of the Peace, Alderman or Magistrate, in any county where the property insured may be located, and to direct any process to the sheriff or constable of either of the counties of this Commonwealth; and it shall be the duty of the sheriff or constable to execute all process directed to him under the provisions of this Act upon the president or other chief officer of the company against whom the same issued as he shall be directed, or upon the agent of any company incorporated, or not incorporated, by the Legislature of this Commonwealth; and the manner of service and return shall be in the same manner as like process is now by law required to be made, and the same shall be returned to the court, justice of the peace, alderman or magistrate issuing the same; and all proceedings upon any suit not under this Act shall be the same as in other cases."

It will be noticed that the framer of the Act of 1889 seemsto have been unmindful of the Act of 1868. The effect of this is that the Act of 1868 taken in connection with the Act of 1857 is applicable to suits in court, but so far as proceedings before a magistrate are concerned while the Act of 1889 makes them applicable to suits against insurance companies in the county where the property insured is located, this legislation is not applicable to proceedings before an alderman relating to life and accident insurance company contracts.

The conclusion at this point of the investigation is that justices of the peace or aldermen have no jurisdiction to send process to another county in cases upon life and

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accident insurance contracts, even though the person insured resides in his county, or died in his county.

The legislation applicable to the case in hand is the Act of July 9, 1901, Section 1, P.L. 616, Stewart's Digest 239, pl. 10, relating to the feature of the case that the defendant is a life insurance company, and the Act of April 3, 1903, P.L. 139, Section 1, g, Stewart's Digest, 238, pl. 5, relating to the feature that the defendant is a corporation.

The Act of July 9, 1901, is as follows:

"Fourth. The writ of summons on any character of insurance policy or certificate may also be served in the manner provided by Section 2 in any other county than that in which the writ issues by the Sheriff of such other county, who shall be deputized for that purpose by the Sheriff of the county in which the writ issues, if the insurance was effected in, or the insured person at the time of his death resided in, or the insured property at the time of the loss was located in the latter county; provided that in such event the court shall abate the writ if it shall be made to appear at any time before verdict or judgment by default that the insurance was not effected in, nor was the insured person residing at the time of his death in, nor was the insured property at the time of loss located in the county in which the writ was issued."

This was extended to Justices of the Peace and Aldermen by the sixteenth clause of the same Act, Stewart's Digest 243, pl. 33, which is as follows:

"Sixteenth. Writs issued by any Magistrate, Justice of the Peace or Alderman shall be served in the county wherein they are issued by the Constable, or other officer

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therein, to whom given for service in the same manner and with like effect as similar writs are served by the Sheriff when directed to him by the proper court; and in cases within the jurisdiction of such Magistrate, Justice of the Peace or Alderman, a Constable or other officer of any county of the Commonwealth, authorized to serve writs therein, may be deputized to make the service, in whole or in part, in cases where the Sheriff of another county might be deputized as hereinbefore set forth."

It follows that in suits before an Alderman against life and accident insurance companies, process can only be served in another county where the insurance was effected in, or the insured person at the time of his death resided in his county, and in such case the process can only be served in another county by a person authorized to make service of such process being deputized by a constable of the county where the process issues.

Considering the defendant, therefore, as a life insurance company, it follows that there was no legal authority for the constable in the case in hand to go outside of his county to serve the process, and the Magistrate, therefore, did not have jurisdiction of the defendant.

Considering the case as a suit against a corporation does not aid the record.

Under the Act of April 3, 1903, the process has not been served in accordance with that Act, first, because it is served upon a general manager at his place of business, and, secondly, because it is not served by an officer of the county where service has been attempted to be made duly authorized to serve the process, and duly deputized for that purpose. The Act of 1903 is as follows: "If the

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corporation, partnership limited or joint stock company has no office or place of business in actual operation in the county in which the cause of action arose, and no member of its Board of Directors or other officer is a resident of the county in which the cause of action arose, then service may be made in any of the methods set forth in clauses a, b, c, d, e, or f in any other county than that in which the writ issues by the Sheriff of such other county, who shall be deputized for that purpose by the Sheriff of the county in which the writ issues."

By the sixteenth clause above quoted Constables may act with reference to process issued by Magistrates in the same manner as Sheriffs are authorized to act with reference to process issued by the courts. The record in this case does not disclose that service has been made in accordance with the sub-clauses a, b, c, d, e, or f.

We, therefore, conclude that the judgment rendered by the Alderman is invalid, and the exceptions filed are sustained, and the record of the Magistrate quashed.

—From the Weekly Reporter, Chester, Pa.

I. Rosenheim v. Michael Stanishto

Judgment was obtained before J. P., October 3, 1894, execution issued thereon October 24, 1894, and return made, nulla bona. Eleven years later, September 20, 1905, without further proceedings, transcript thereof was filed in Common Pleas. Said judgment was on motion stricken off.

Transcript of a judgment from justice's docket, entered in the Common Pleas, has all the force of a judgment originally entered therein, provided that, at the time of such entry, it is alive and ready for execution.

JUDGMENT—TRANSCRIPT—ENTRY OF TRANSCRIPT IN C.P.
WITHOUT REVIVAL—STRIKING OFF JUDGMENT.

No. 1092, October Term, 1905, C.P. of Luzerne Co.

Rule to strike off Judgment.

Frederick B. Davis, Esq., for Plaintiff.

John Menovsky, Esq., for Defendant.

Opinion by Lynch, P.J., Jan. 16, 1907.

OPINION.

This is an effort, on part of defendant, to have a judgment stricken off. On an action before a justice, judgment for \$28.20 was entered in favor of plaintiff and against defendant on October 3, 1894. Execution was issued October 24th, 1894, and returned by the constable, no personal property whereon to levy. Nothing more appeared to have been done in the case until September 20, 1905, when a transcript was filed in this Court. On the 19th of October, 1905, this rule was granted.

Taking the Act of May 5, 1854, (P.L. 581,) and that of June 24, 1885, (P.L. 160), together, it is meant that the

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judgment on the justice's docket, alive, ready for execution five years from the date it was entered, can, during that time, by transcript, be entered in the Common Pleas, and, if there be a return of "no goods" to an execution upon it in that time, it has all the force of a judgment of the Common Pleas originally entered in that Court. *Smith v. Wehrly*, 157 Pa., 407.

The judgment entered by the justice was not alive or ready for execution at the time this transcript was taken and therefore the judgment entered in the Common Pleas was irregular. Judge Halsey in *Blau & Co. v. Sperling, et al.*, 10 Kulp, 404.

The rule is made absolute.

Reported by G. Fred. Lazarus, Esq., Wilkes-Barre, Pa.

Charles Mell to the Use of A. W. Scott, Agent,
v. A. H. Hendricks.

Where defendant was present at trial before justice, had opportunity to make defense, judgment is entered against him, and then appeals, appeal will be stricken off, when the note sued on contains the following provision: "Provided that if Charles Mell makes the payment on said farm to Charles Scott so that I will have a year's time, then the note to be good, if not, to become null and void."

SUIT ON NOTE—JUDGMENT—APPEAL—STRIKING OFF
APPEAL.

No. 234, October Term, 1905, C.P. of Luzerne County.

Rule to strike off Judgment.

D. M. Hobbes, Esq., for Plaintiff.

D. C. Coughlin, Esq., for Defendant.

Opinion by Ferris, J., Jan 7, 1907.

OPINION.

The plaintiff sued before a justice of the peace to recover twenty-five dollars, being the amount of a judgment note, the execution of which is conceded, and in which the defendant had waived the right of appeal. The note also contained the following agreement: "Provided, that if Chas. Mell makes the payment on said farm to Chas. Scott, so that I will have a year's time, then the note to be good, if not, to become null and void." That the condition had not been fulfilled, and that the note was therefore "null and void" was matter of defense. The defendants were present at the trial, and had an opportu-

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ity to present this defense or any other (e. g. payment) which they might have, if any. The judgment was against them, and they had no right of appeal, because, they had waived it. *Cawley v. Bohan*, 120 Pa., 295.

The rule is made absolute.

Reported by G. Fred Lazarus, Wilkes-Barre, Pa.

A. Mayers v. John D. Leathery

Where plaintiff brings suit for injury done by defendant's team, in charge of and being driven by his employe, defendant himself not being present, and claims that the proceeding was brought to recover for the negligence of said employe in colliding with the plaintiff's carriage, it was held on certiorari that the remedy is by an action of trespass on the case, and that the alderman had no jurisdiction.

NEGLIGENCE—DAMAGES TO PERSONAL PROPERTY— JURISDICTION.

No. 413, January Term, 1908, C.P. of Dauphin Co.

Certiorari.

S. H. Zimmerman, Esq., for Plaintiff.

Fred. C. Miller, Esq., for Defendant.

Opinion by George Kunkel, P.J., August 7, 1908.

EXCEPTIONS.

1. The record does not show that the alderman had jurisdiction, and in fact he did not have any jurisdiction, as the action was not trespass, but trespass on the case.

2. Judgment was entered upon default of appearance by the defendant, and the defendant was not compelled to appear in the case, in which the alderman had no jurisdiction, and the judgment thus given was erroneous and should be stricken off by the Court.

3. An alderman has no jurisdiction or authority to render judgment in actions on the case.

4. The plaintiff brought the action or plea of assumpsit, where if the action would not be trespass on

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the case, it should have been brought in an action of trespass.

5. The record is also, in other respects, insufficient and defective, and shows no warrant of authority to enter the judgment.

OPINION.

The exceptions filed in this proceeding go to the jurisdiction of the alderman. The record shows "a claim against the defendant for damages done by defendant's team to the plaintiff's carriage (breaking wheel) amounting to \$3.30-100." The defendant failed to appear, and judgment was entered against him for that sum. It is agreed between counsel that at the time the injury was done, the defendant's team was in charge of and was being driven by his employe, defendant himself not being present and that this proceeding was brought to recover for the negligence of the employe in colliding with the plaintiff's carriage. The remedy in such case is by an action of trespass on the case. *Phila., Germantown & Norristown R.R. Co. v. Wilt*, 4 Whar., 143; *Strohl v. Levan*, 39 Pa., 177; *Yerger v. Warren*, 31 Pa., 319; *Drew v. Peer*, 93 Pa., 234, and the alderman had no jurisdiction; *Gingrich v. Sheaffer*, 16 Sup. Ct., 299.

The judgment is accordingly reversed and the proceeding set aside.

Reported by Harry M. Bretz, Esq., Harrisburg, Pa.

Commonwealth v. M. Murphy and James Miller

Under the provisions of the Act of July 14, 1897, P.L. 266, and the decisions thereunder, a salaried policeman of a borough in his capacity as such is not entitled to any remuneration for services that he or some other sworn officer *only* could perform, but when the same services could be performed by any *private person*, who is capable of proving the service, he, as a private person, can perform the service and will be entitled to remuneration.

Warrants and summonses are directed to the sheriff or other sworn officer of the law and can be served only by them or a lawful deputy, while on the other hand the writ of subpoena is directed to the person who is commanded to appear and testify; consequently it may be served by a constable, sheriff or any person who is capable of proving the service.

CONSTABLE—SHERIFF—SERVICE OF SUMMONS—WARRANT AND SUMMONSES—SERVICE OF SUBPOENAS—FEES—SALARIED POLICEMEN ENTITLED TO FEES—BOROUGH—PROTHONOTARY—TAXATION OF COSTS.

No. 11, December Sessions, 1907, C.P. of Clarion Co.

Exceptions to Prothonotary's Taxation of Costs.

W. J. Geary, District Attorney, for Exceptants.

J. T. Reinsel, County Solicitor, Contra.

Opinion by Wilson, J.

OPINION.

A. J. Frampton has filed two exceptions to the Prothonotary's taxation of costs in the above case, which are as follows:

1. The Prothonotary erred in not allowing costs to John Morris subpoenaed on behalf of the Commonwealth.
2. The Prothonotary erred in striking out of the Commonwealth's bill of costs witness fees and mileage

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for witness John Morris, and in not affirming the bill of costs filed by the Commonwealth.

It is true this witness was subpoenaed and in attendance at Court on the first day of the sessions, but departed and was not present at the trial of the case. The District Attorney testified that he did not discharge him or order it to be done.

The Act of February 23d, 1889, P.L. 8, only allows fees to witnesses for "attendance at Court," and in the case of *Bremerman v. Hayes*, 22 C.C. 399, Judge Hemphill says: "Witnesses are allowed compensation because they are or may be necessary to a correct and proper disposition of a case; but unless in 'attendance at Court' when the case is called for trial, they could be of no service and would not be entitled to compensation."

John H. Dinger files three exceptions to the same taxation as follows:

1. The Prothonotary erred in not allowing exceptant for serving 7 subpoenas, \$1.40, being for service at hearing.

2. The Prothonotary erred in not allowing exceptant for serving 12 subpoenas, \$6.50, being for services in Court for trial.

3. The Prothonotary erred in not allowing exceptant the various items in said bill as taxed and set forth.

The above items were taxed as part of the costs in the Commonwealth's bill and excepted to by the defendant before the Prothonotary on the ground that John H. Dinger was a salaried policeman of the Borough of Clarion and as such officer, under the provisions of the Act of July 14th, 1897, P.L. 266, it was not lawful for him to charge or accept any fee or compensation in addition to

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his salary for services rendered or performed by him. On the authority of *Weaver v. Schuylkill County*, 17 Superior Court, 330, the Prothonotary sustained the exceptions.

Under the provisions of the said Act of 1897, and the decisions thereunder, undoubtedly, John H. Dinger, in his capacity as a policeman of Clarion Borough, would not be entitled to any remuneration for services that he or some other sworn officers only could perform, but when the same services could be performed by any private person, who is capable of proving the service, we think he as a private person could perform the service and would be entitled to remuneration. Warrants and summonses are directed to the sheriff or other sworn officer of the law and can be served only by them or a lawful deputy, while on the other hand the writ of subpoena is directed to the person who is commanded to appear and testify; consequently, it may be served by a constable, sheriff, or any private person who is capable of proving the service. There is no evidence to show that this service was not performed by John H. Dinger as a private person.

Under the law we are satisfied that the exceptant would not be entitled to recover, neither for his own use or for the use of Clarion Borough, for making the arrests.

And now, June , 1908, the exceptions on the part of A. J. Frampton are dismissed. The exceptions filed by John H. Dinger are sustained, and the costs for serving subpoenas, as taxed in the Commonwealth's bill, allowed. The ruling of the Prothonotary on the item of four dollars to Officer Dinger, on the transcript of the justice, is affirmed.

Reported by A. A. Geary, Clairon, Pa.

JUSTICES' LAW REPORTER

The editor of the Justices' Law Reporter, taking into consideration the fact that the Journal has a wide circulation amongst attorneys, as well as justices of the peace, and not desiring to duplicate reports of decisions, has concluded that instead of publishing full reports of cases decided in the Superior Court, to publish only syllabi and extracts therefrom, thus giving the magistrates an opportunity to get at the law, without being obliged to read through long written opinions.

It is also believed that attorneys will find this plan a very good one, in that it will give them an opportunity, in making up briefs, to consult the J. L. R. as to cases arising before magistrates, with a view of finding the law as laid down by the Appellate Courts.

The following is a list of cases recently decided in the Superior Courts:

A constable's return to the Court of Quarter Sessions, relative to obstruction of a public highway.

Commonwealth, Appellant, v. the Huntington and Broad Top Mountain Railroad and Coal Company

Where a bill of indictment is found upon a constable's return, the offense charged in the bill must be identical with that, the essentials of which, at least, appear in the constable's return.

An indictment charging the common-law offense of unlawfully obstructing a public highway cannot be sustained, where the constable's return, upon which it is founded, charges that the defendant, a railroad company, took and used a public road under the Act of February 19, 1849, P.L. 79, and failed to construct another public road in place of the one taken and used.

Where a railroad company, having exercised the power conferred upon it to take an existing public highway, refuses at the same time to obey the statutory command to reconstruct another of prescribed character in its stead, it is guilty of a breach of public duty declared by the statute for which it may be indicted and convicted.

CRIMINAL LAW—CONSTABLE'S RETURN—INDICTMENT—
OBSTRUCTION OF HIGHWAY—FAILURE TO CON-
STRUCT SUBSTITUTED ROAD—RAILROADS.

Appeal No. 180, October Term, 1907, from Q.S.

Bedford County, No. 16, April Term, 1907.

Opinion in the Lower Court by Woods, P.J., and in the Superior Court by Head, P.J., No. 35 Superior Court, 416.

Entry of judgment on official bond of tax collector to the commonwealth.

**Commonwealth v. Maxwell,
Appellant**

Where an official bond given by a tax collector to the commonwealth has been entered up by the county, a borough and a school district acting together, and judgment entered thereon, a poor district which has placed its duplicate for poor taxes in the hands of the collector, may subsequently intervene as a party plaintiff by a scire facias on the judgment, and it is immaterial that the judgment was entered on a warrant of attorney and was not the result of an adverse action on the bond.

A report of county auditors, showing that a county treasurer was not charged with any balance outstanding in the hands of a borough collector, is not conclusive in favor of the borough collector, in a proceeding against him, instituted by a poor district which had placed in the collector's hands its duplietae for poor taxes.

Where a tax collector's liability is fixed at a sum stated for particular year by the auditors, the fact that in subsequent years the auditors' reports make no further mention of such balance, does not relieve the collector from its payment.

TAX COLLECTOR—BOND—JUDGMENT—SCIRE FACIAS—
COUNTY AUDITORS—REPORTS.

Appeal No. 21, April Term, 1907, from C.P. Butler County, No. 31, December Term, 1905.

Opinion in the Lower Court by Galbreath, P.J., and in the Superior Court by Head, P.J., No. 34 Superior Court, 631.

Court of Quarter Sessions is not bound to issue process upon constable's return to bring in a person charged with violation of the liquor laws, or in default of bail, to commit him to prison.

**Commonwealth, Appellant,
v. Reinsel**

In the absence of a statute authorizing it, no appeal can be taken from a judgment or order which is not a final disposition of the matter in controversy.

The Court of Quarter Sessions is not bound to issue process upon a constable's return to bring in a person charged with violation of the liquor laws, or, in default of bail, to commit him to prison. Such action is within the discretion of the Court, and a very plain case of the abuse of its discretion ought to be exhibited by the record to warrant an appeal. If the Court has granted such an order, but upon mature consideration, and before indictment found, discharges the accused, the Court cannot be convicted of reversible error.

APPEALS—INTERLOCUTORY ORDER—CONSTABLE'S RETURN—PROCESS—QUASHING APPEAL.

Appeal No. 212, April Term, 1907, from Q.S. Clarion County, No. 1, May Term, 1907.

Opinion in the Lower Court by Wilson, P.J., Per Curiam, No. 34, Superior Court, 260.

Supervisors are not precluded from closing up drain, and again diverting water upon neighboring land, where former supervisors have drained the same along a public road.

**Lorah, Appellant, v. Amity
Township**

Where supervisors open a drain along the side of a public road, and waters which naturally flowed from the road on to the lands of an adjoining owner, are carried off by the drain, and this condition of things exists for many years, a subsequent board of supervisors is not precluded thereby from closing up the drain, and again diverting the water on to the neighboring land, if they do so in the exercise of a proper discretion. In such a case the neighboring owner never acquired a right to use the road as a conduit to carry water from his premises.

**ROAD LAW—DIVERSION OF WATER FROM ROAD—
PUBLIC ROAD—SUPERVISORS—DISCRETION.**

Appeal No. 30, October Term, 1905, from C.P. Berks County, No. 53, September Term, 1905.

Opinion in the Superior Court by Henderson, J., No. 35, Superior Court, 542.

President of the borough councils may be compelled by mandamus to sign order for payment of debt due on the building contract.

Breslin, Appellant, v. Earley

Payments of the debts of a borough lawfully incurred in the daily administration of its affairs, is purely ministerial, and ordinarily involves no executive action, but devolves upon the council and the treasurer.

Where a borough council has ordered the payment of a debt due by the borough on a building contract, and the borough president refuses to sign an order for the payment, on the ground that in his judgment the contract was not properly performed, the president may be compelled by mandamus to sign the order, inasmuch as the signing of the order is a mere ministerial act, and it is not the judgment of the president, but it is that of the council which determines that the bill should be paid.

One of the most common uses of the writ of mandamus is to enforce obedience of officers who decline performing a mere ministerial act, and where such an act is to be done, a specific duty or act enjoined, and there is no other specific remedy, performance will be compelled by mandamus.

**BOROUGH—BOROUGH PRESIDENT AND TREASURER—
PAYMENT OF BOROUGH DEBT—REFUSAL OF PRESI-
DENT TO SIGN ORDER—MANDAMUS.**

Appeal No. 54, March Term, 1908, from C.P. Carbon County, No. 50, October Term, 1907.

Opinion in the Lower Court by Heydt, P.J., and in the Superior Court by Orlady, J., No. 36, Superior Court, 49.

It is no objection to validity of county treasurer's bond that it was given to commissioners of the county instead of the commonwealth.

**Monroe County v. Eilenberger,
Appellant (No. 1)**

It is no objection to the validity of a county treasurer's bond that it was given to the commissioners of the county by their official title, instead of the county by its corporate name, nor that it was given to the county, instead of the commonwealth. *Com. v. Schadt*, 214 Pa., 592, distinguished.

An action may be brought in the name of the county to the use of a borough and certain townships of a county against a former county treasurer and his sureties upon his official bond given to the county as obligee and conditioned as prescribed in Sec. 33 of the Act of April 15, 1834, P.L. 537.

**BONDS—COUNTY TREASURER'S BOND—COUNTY COM-
MISSIONERS—NAME OF OBLIGEE.**

Appeal No. 7, January Term, 1907, from C.P. Monroe County, No. 24, December Term, 1905.

Opinion in the Lower Court by Staples, P.J., and in the Superior Court by Rice, P.J., No. 34, Superior Court, 22.

The bond of county treasurer stands for protection of the several municipal divisions of a county.

**Monroe County v. Eilenberger,
Appellant (No. 2)**

Under a proper construction of the Act of June 14, 1836, P. L., 637, Sec. 6, Par. II, a party for whose protection the bond required by the Act was given, whose cause of action accrued before a judgment on the bond, and who did not avail himself of the right given by Paragraph 3 of the same Section to be made a party to the writ, is not barred by the judgment. The Act is not to be construed as affording a remedy only to plaintiff in the original suit, and for breaches to his injury occurring after judgment for the penalty, and to others whose causes of action matured after such judgment.

A bond given by a county treasurer and conditioned in strict accordance with Sec. 33 of the Act of April 15, 1834, P.L. 537, stands for the protection of the several municipal divisions of the county which are entitled to portions of the liquor license fees received by him.

BOND—OFFICIAL BONDS—JUDGMENT—ACT OF JUNE 14,
1836, P.L. 637, SEC. 6, PAR. II.

Appeal No. 32, January Term, 1907, from C. P. Monroe County, No. 24, December Term, 1905.

Opinion in the Lower Court by Staples, P.J., and in the Superior Court by Rice, P.J., No. 34, Superior Court, 28.

In re sheriff's levy and subsequent wrongful withdrawal thereof.

Commonwealth to Use v. Osler, Appellant

Where the district attorney enters up the bond of a liquor dealer after the latter had been convicted of violating the liquor laws, and issues execution under which levy is made upon the property of the principal of the bond, and thereafter the sheriff on being informed by the attorney for the principal, who is also county solicitor, that an appeal has been taken, and on the advice of such attorney, returns the writ without further execution, and subsequently the property of the principal is either sold under another writ, or eloiigned from the county, the sheriff will be liable to the bondsmen of the liquor dealer, after the affirmance of the conviction, and after they have been compelled to pay the fine by reason of the failure to find assets of the principal.

In such a case the sheriff was bound to look to his writ and follow its direction. If he desired protection, he should have gone into the Court of Common Pleas, from whence the writ issued, and asked for a proper order under the circumstances. The order of supersedeas in the quarter sessions had no effect on the execution issued out of the Common Pleas.

The fact that the county had a beneficial interest in the fund when ultimately secured, did not give the solicitor of the county control over the writ in opposition to the district attorney who issued it, and whose name was indorsed on it as counsel for the plaintiff.

The sheriff's wrongful withdrawal from a levy embracing all the defendant's goods, is prima facie evidence that such goods were of value sufficient to pay plaintiff's debt.

SHERIFFS—WRONGFUL RETURN—JUDGMENT ON BOND— LIQUOR LAW—APPEALS—SUPERSEDEAS.

Appeal No. 11, March Term, 1907, from C.P. Sullivan County, No. 78, September Term, 1902.

Opinion in the Lower Court by Terry, P.J., and in the Superior Court by Orlady, J., No. 34, Superior Court, 138.

Conspiracy to obstruct and defeat laws relating to Sunday labor.

**Commonwealth v. Boulos,
Appellant**

On an indictment for a conspiracy to obstruct and defeat the laws relating to Sunday labor, a conviction may be sustained where it appears that the defendant for several successive Sundays kept open his store on Sunday, and thereafter paid the fines imposed upon himself and clerks, and that subsequently he secured the assistance of two strange and unknown persons, who came to his establishment on Saturday night, and after assisting in the business on Sunday disappeared shortly after midnight leaving no traces of their whereabouts.

The declarations of a person indicted for conspiracy may be admitted against him as evidence of the conspiracy, although the fact of the conspiracy had not been shown by other evidence, and no offer made to show it, if it appears that the case is not pressed against the other defendants.

CRIMINAL LAW—CONSPIRACY—SUNDAY LAW.

Appeal No. 96, April Term, 1907, from Q.S. Fayette County, No. 80, June Term, 1907.

Opinion in the Lower Court by Reppert, P.J., and in the Superior Court by Beaver, J., No. 35 Superior Court, No. 102.

Petition to amend justice's transcript.

McCloskey v. O'Hanlan, Appellant

Where an appeal has been taken from a justice of the peace and a transcript of the judgment filed, a petition asking leave to amend by filing a transcript annexed to the petition will not be granted, where there is nothing on the record to show that there was any fraud practiced, nor anything to show that the transcript attached to the petition was correct and that the one filed was incorrect.

JUSTICE OF THE PEACE—APPEALS—TRANSCRIPT—
AMENDMENTS—NAMES.

In an action of ejectment where the defendant files a plea and answer, and subsequently, in compliance with a rule for a more specific answer, files a second answer the Court has no authority in law to enter a judgment against the defendant for want of a sufficient specific answer.

EJECTMENT—ANSWER—INSUFFICIENCY OF ANSWER—
ACT OF MAY 8, 1901, P.L. 142.

Appeal No. 104, October Term, 1907, from C.P. No. 1, Philadelphia County, September Term, 1906.

Opinion in the Superior Court by Beaver, J., No. 35, Superior Court, 95.

The petition to the filing of the transcript of Magistrates' record in desertion case dismissed as untenable.

**Commonwealth v. Brownell,
Appellant**

Where the transcript of a record of a magistrate in a desertion case is duly certified by the magistrate, and indorsed "filed," with a date named, and the docket of the Quarter Sessions sets forth exactly the contents of the magistrate's transcript, but does not state in so many words that the transcript was filed in the clerk's office of the Quarter Sessions, or that the indorsement was made by the clerk of the Quarter Sessions, the Superior Court, when the whole record is taken up to that Court, by certiorari, will dismiss as untenable the objection that the record does not show that the transcript was filed in the Court below.

PRACTICE, Q. S.—DESERTION—RECORD—FILING OF
RECORD—APPEALS.

The evidence given in desertion proceedings upon a hearing, and the recital of facts in the opinion filed by the Court of Quarter Sessions in such a proceeding, cannot be considered by the Superior Court in reviewing the proceedings upon certiorari.

APPEALS—CERTIORARI—EVIDENCE—RECITAL OF FACTS
IN OPINION OF COURT BELOW.

Appeal No. 22, January Term, 1908, from Q.S. Lackawanna County, No. 111, April Term, 1907.

Opinion in the Superior Court by Rice, P.J., No. 35. Superior Court, 249.

The magistrate has jurisdiction of actions of contract either express or implied, but not of that sort of contract arising remotely out of the compact of government.

Birkhead v. Ward, Appellant

The Legislature, in conferring jurisdiction on justices of the peace of causes of action arising from contract, either express or implied, had in view those contracts which arise immediately out of a course of dealing between the parties, and not that sort of contract that arises remotely out of the compact of government.

In an action to recover the cost of repairing a retaining wall which was alleged to belong to defendants, and which had fallen on plaintiff's land, the justice of the peace has no jurisdiction where no express contract is averred by the plaintiff, and there is no implication of a contractual obligation of the defendants to pay for the cost of repairs, which could be enforced by action of assumpsit before the justice. Even if it might be held that such an action was upon a contract, the contract is plainly one "where the title to land or tenements may come into question," and the justice has no jurisdiction under the Act of 1810.

Where the transcript of a justice of the peace shows that the plaintiff "claims ten dollars and fifty cents, cost of repairing retaining wall belonging to defendants," the transcript does not show a cause of action *ex delicto*.

A justice of the peace has jurisdiction over trespass only where the trespass is *vi et armis*, and the injury is immediate; his jurisdiction under the act of 1814, did not extend to injuries for the redress of which the action of trespass on the case was the appropriate and exclusive remedy.

If a justice of the peace has no jurisdiction of the cause of action, either under the Act of 1810, or the Act of 1814, the Common Pleas has no jurisdiction thereof on appeal.

JUSTICE OF THE PEACE—JURISDICTION—CONTRACT—
TITLE TO LAND—TRESPASS—TRESPASS VI ET
ARMIS—APPEALS.

Appeal No. 139, October Term, 1907, from C.P. No. 2, Philadelphia County, No. 1043, September Term, 1906.

Opinion in the Superior Court by Rice, P.J., No. 35, Superior Court, 235

Improper remarks of counsel in opening by referring to the fact that before the justice of the peace there had been a judgment for plaintiff.

**Fisher v. Pennsylvania Company,
Appellant**

On the trial of an appeal from a justice of the peace, a statement made by counsel in his opening to the effect that before the justice of the peace there had been a judgment for plaintiff, constitutes good reason for directing the withdrawal of a juror, and if this is not done, it is a reversible error on review of the record; and this is especially the case where the Court gave the jury no instructions on the subject.

PRACTICE, C.P.—IMPROPER REMARK OF COUNSEL—REFERENCE TO JUDGMENT OF JUSTICE OF THE PEACE.

Appeal No. 66, April Term, 1907, from C.P. Lawrence County, No. 3, March Term, 1904.

Opinion in the Lower Court by Porter, P.J., and in the Superior Court by Orlady, J., No. 34, Superior Court, 500.

Municipal ordinance forbidding the sale of merchandise on Sunday, as applied to newspapers.

**Newcastle City v. Treadwell,
Appellant**

A municipal ordinance forbidding the sale on Sunday of "goods, wares, merchandise, or other articles and things whatsoever," applies to newspapers kept for sale upon the shelves or tables of a news-dealer.

SUNDAY LAW—MUNICIPAL ORDINANCE—SALE OF NEWSPAPERS—"GOODS, WARES AND MERCHANDISE."

Appeal No. 100, April Term, 1907, from Q.S. Lawrence County, No. 83, June Term, 1907.

Opinion in the Lower Court by Porter, P.J., Per Curiam, No. 35, Superior Court, 30.

Kelly v. Fiorello

Upon certiorari to a Justice of the Peace, an exception to the jurisdiction of the justice will not be considered unless accompanied by an affidavit as prescribed by Rules of Court, page 32, Sec. 3, nor will depositions be considered. Testimony must be taken in open Court as prescribed by Rules of Court, page 32, Sec. 4.

JUSTICE OF THE PEACE—CERTIORARI—EXCEPTION TO
JURISDICTION—FAILURE TO FILE AFFIDAVIT—TES-
TIMONY TO SUPPORT EXCEPTIONS.

C.P of Delaware County.

Certiorari to a Justice of the Peace.

Opinion by Broomall, J., August 15, 1907.

OPINION.

The essential facts are stated in the opinion of the Court.

The plaintiff obtained judgment against the defendant on May 28, 1906, for fifty-one dollars and costs before a Magistrate by default for want of an appearance. On the same day the defendant procured to be issued out of this Court a writ of certiorari to the Magistrate, which was duly returned on May 29, 1906. On June 8, 1906, defendant's attorney filed an exception, challenging the jurisdiction of the Magistrate, in that, as the exception alleges, the defendant was a non-resident, and the summons issued by the Magistrate was a long summons, instead of the short summons prescribed by the 26th Section of the Act of July 12, 1842, P.L. 345, Stewart's Digest, p. 2104, pl. 56. This exception did not comply with

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the rule of Court, page 32, Section 3, in the respect that it was not accompanied by an affidavit as therein required. On November 15, 1906, a deposition of Phillip Miner was filed by the defendant. This is also in violation of a rule of Court, page 32, Section 4, which requires testimony to be taken in open Court. On November 19, 1906, the plaintiff moved the Court to quash the writ of certiorari and dismiss the exceptions filed, for the reason *inter alia*, that the exception to the jurisdiction of the Magistrate was not accompanied by an affidavit. On November 24, 1906, when the case was called for argument the exception was quashed and the judgment of the Magistrate was affirmed. Subsequently, defendant's attorneys applied to the Court for a re-argument, representing to the Court that the plaintiff's motion was merely to quash the writ, and that the Court had quashed the writ, notwithstanding there was no weakness in the writ. The defendant also applied for leave to file an affidavit to accompany his exception. There is a misunderstanding of the scope of the plaintiff's motion and also as to the previous action of the Court. The plaintiff's motion was not only to quash the writ, but also to dismiss the exceptions. The Court did not quash the writ, but, as appears from the endorsement on the back of the writ, quashed the exception and affirmed the judgment. All of this upon reconsideration appears to be regular. The parties appear to be endeavoring to administer to each other their respective technical rights and obligations, and each is calling upon the Court to assist them in their effort. We can but accede to a unanimous request of this kind, and congratulate ourselves that we have it in our power to accommodate both sides.

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The record of the Magistrate appears to be in due form. It does not disclose the alleged non-residence of the defendant, and such alleged non-residence has not been made to appear to us by exception and evidence.

Therefore, we can but repeat our former decision, which is that the exception of the defendant be dismissed and the judgment of the Magistrate affirmed.

From the Weekly Reporter, Chester, Pa.

Mallie v. Yeadon Borough

To recover a fine or tax paid under protest it must appear that the exaction of payment was unlawful, that payment was made under a present existing and potential pressure against either person or property, and that payment was made with the accompaniment of protest, or some other notice of an intention of reclamation.

An undertaker was tried and sentenced to pay a fine of fifty dollars for violation of a borough ordinance, he paid the fine for the purpose of avoiding imprisonment. Subsequently he was arrested for two violations of the same ordinance and thirty-three additional proceedings were about to be commenced against him for other violations. An agreement was then entered into reciting the thirty-six prosecutions, the fact that the defendant desired to settle them, and agreeing that in two cases fines should be imposed and that in neither of said cases nor in the first case should an appeal or certiorari be taken, and that the remaining thirty-three cases be dismissed. The defendant then paid the sum of one hundred and thirty dollars, which with the first fine made one hundred and eighty dollars, on the basis or five dollars for each prosecution. Defendant brought suit to recover back the fine of fifty dollars paid in the first prosecution. Held, That he was not entitled to recover and that judgment should be entered against him.

One attacking the validity of a municipal ordinance on the ground that it is unreasonable must show that it is so patently unreasonable as to convict the municipal legislature of an abuse of their power.

In determining whether an ordinance prescribing a fee to be paid for a permit to bury a body is a police regulation or a revenue measure the court will consider that the provision is made for the future, that there is uncertainty as to the number of burials which will take place, that provision must be made for the administrative machinery by which the permit is issued, for supervision to see that the ordinance is complied with, for special provision for contagious diseases, for regulation of carriages attending the funeral, for repair of the streets, and for increased travel and police supervision of the funeral.

An ordinance requiring the payment of a fee of one dollar for a permit to bury a body is not a revenue measure and therefore invalid, notwithstanding the amount received between the passage of the ordinance and the time the question of its validity is heard, is greatly in excess of the amount expended by the borough in the maintenance of its Board of Health.

The registry book of burials in a cemetery, kept at the office of the cemetery, in the handwriting of a person not present at the trial is not admissible in evidence to show the number of burials made in the cemetery.

Inscriptions on tombstones in a cemetery are admissible in evidence to show the dates of the death and burial of the decedents.

A Justice of the Peace has jurisdiction in a suit to recover moneys illegally coerced from another and paid under protest.

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The cases bearing on the recovery of money paid under duress, the validity of ordinances requiring payment of fees for permits and the jurisdiction of Justices of the Peace considered.

MONEY PAID UNDER DURESS, RECOVERY OF—JURISDICTION OF JUSTICE OF THE PEACE—CEMETERIES—MUNICIPAL ORDINANCE—ORDINANCE, POLICE REGULATION OR REVENUE MEASURE—BURDEN OF PROOF—EVIDENCE—CEMETERY RECORD.

C.P. Delaware County.

The facts are stated in the opinion of the Court.

E. H. Hall for Plaintiff.

V. Gilpin Robinson and I. E. Johnson for Defendant.

Opinion by Broomall, J., June 22, 1908.

OPINION.

This suit comes into Court on an appeal from the judgment of a justice of the peace, and the decision of it has been submitted to the Court by an agreement in writing, signed by the parties under the provisions of the Act of April 22, 1874, P.L. 109. The suit is brought for the purpose of recovering a fine paid by the plaintiff to the defendant of fifty dollars on January 25, 1907, in compliance with a judgment rendered by Justice Evans for a breach of ordinance.

FACTS.

The following facts are found by the Court:

1. On April 22, 1895, an ordinance of the Borough of Yeadon was adopted entitled: "Ordinance No. 9. An

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Ordinance for the further regulation of interments of human bodies in the Borough of Yeadon." This ordinance contains inter alia the following provisions:

"2d. No undertaker, nor any other person, shall bring or cause to be brought into any portion of the Borough of Yeadon in order that the same may be buried therein, or bury or cause to be buried in any ground within the limits of said borough the body of any deceased human being, without in each case giving, or causing to be given to the Secretary of the Board of Health of said borough, or to his duly authorized deputy, information (accompanied by the exhibition of a proper death certificate, or other satisfactory proof), showing as nearly as can be the name, sex, color, probable age, place of last residence and disease, or cause of death of the decedent, and also where the funeral is to take place from, and obtaining a permit for the burial of such body, the fee to be paid to such Secretary or deputy before the issuing of which permit shall be one dollar."

"6th. Every undertaker, person, company or corporation violating, assisting in violating, or permitting to be violated any provision of this ordinance, shall for each violation pay a fine or penalty of not less than five or more than one hundred dollars in the discretion of the justice imposing the same, together with all cost of collection, which fine or penalty shall be recovered as such penalties are by law recovered."

2. On May 26, 1906, the plaintiff, Peter Mallie, an undertaker of the City of Philadelphia, buried the body of James P. Harrison in Holy Cross Cemetery, within the limits of the Borough of Yeadon, and complied with all

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regulations respecting said burial excepting the requirements of Ordinance No. 9, in that he did not obtain a permit for said burial and pay a license fee of one dollar, according to the requirements of said ordinance.

3. On October 19, 1906, the Borough of Yeadon made information before Justice Evans, of said borough, alleging a violation of the said ordinance by the said Peter Mallie, and a warrant was thereupon issued by the Justice for his arrest. This proceeding culminated on January 25, 1907, with a judgment by Justice Evans, finding the said Peter Mallie guilty and imposing upon him a fine of fifty dollars and costs, and in default of payment that he be committed to imprisonment for five days.

4. In the proceeding before Justice Evans referred to Peter Mallie offered evidence to prove that Ordinance No. 9 was a revenue producing ordinance and void, which the Justice declined to receive in evidence.

5. On January 25, 1907, Peter Mallie paid the said fine and costs, amounting to fifty-five dollars and two cents for the purpose of avoiding imprisonment, and the said fine of fifty dollars was paid to the Treasurer of the Borough of Yeadon on or subsequent to January 30, 1907.

6. On January 30, 1907, the said Peter Mallie was brought before Justice Evans on a charge of a similar violation of said ordinance in the burial of two persons. Proceedings were about being commenced against him for a similar violation in thirty-three other cases, whereupon an agreement in writing was made between Peter Mallie and the Borough of Yeadon, of which the following is a copy:

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"Whereas, Peter Mallie is defendant in thirty-five cases for breach of Ordinance No. 9, of the Borough of Yeadon, which are undisposed of:

And whereas, the said Peter Mallie is desirous of settling the said thirty-five cases.

Now it is hereby agreed by counsel for Peter Mallie and counsel for the Borough of Yeadon that the said Peter Mallie pleading not guilty in two of the said thirty-five cases and admitting the fact of the existence of Ordinance No. 9, as per copy hereto attached, and the further facts that the bodies alleged to have been buried in the borough of Yeadon in the informations in the said two cases were caused to be buried by him in ground within the borough of Yeadon without in each case giving or causing to be given to the Secretary of the Board of Health of the Borough of Yeadon, or his duly authorized deputy, the information as required by said Ordinance No. 9 of said borough, without obtaining the necessary permit and without paying the necessary fee as provided by said Ordinance No. 9.

That thereupon there shall be entered in each of the said two cases a judgment for a fine of sixty-five dollars.

Upon the payment of said two fines of sixty-five dollars each, together with costs of suit, the remaining thirty-three cases shall be marked settled, discontinued and ended.

It being expressly agreed by counsel for the said Mallie that in neither of the said two cases, nor in connection with the case in re-burial of James P. Harrison, nor in connection with any of the other thirty-three cases shall there be a certiorari or an appeal.

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The said thirty-five cases are all the cases for which the said Peter Mallie is liable for breach of Ordinance No. 9 of the said borough down to January 26, 1907."

The said Peter Mallie then paid to the Borough of Yeadon one hundred and thirty dollars, which, with the fifty dollars which he had paid on January 25, 1907, made one hundred and eighty dollars, being at the rate of five dollars for each of thirty-six cases. The thirty-six cases were made up of two cases upon which judgment had been agreed to be entered, thirty-three cases coming on and the Harrison case.

7. The permit fees received by the Borough of Yeadon under the operation of Ordinance No. 9 to May 27, 1906, amount to thirty-five thousand one hundred and five dollars.

8. The cost of the maintenance of the Board of Health in the Borough of Yeadon, from 1895 to 1906, both inclusive, amounts to five thousand, one hundred and seventy-nine dollars and fifty-two cents.

The plaintiff requests the following Findings of Fact:

9. Request. "Plaintiff, while under arrest, on warrant issued on information filed, was fined by William B. Evans, Justice of the Peace of the Borough of Yeadon, Delaware county, the sum of fifty dollars for failure to pay to the Board of Health of the said Borough of Yeadon the sum of one dollar for permit to bury the deceased body of one James P. Harrison in said borough in violation of alleged Ordinance No. 9 of said borough, and that said plaintiff paid said fine to said borough under duress of person, or in fear of going to jail for five days."

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Answer. This is found as a fact.

10. Request. "That the said James P. Harrison died in the City of Philadelphia, and that his deceased body was brought into the said borough of Yeadon for interment."

Answer. This is found as a fact.

11. Request. "Said plaintiff in the burial of the deceased body of said James P. Harrison complied with all laws, rules, enactments and ordinances of whatsoever kind or nature governing the interment of deceased human bodies with the exception of alleged Ordinance No. 9, of the Borough of Yeadon."

Answer. This is found as a fact.

12. Request. "That the sums received for the issuance of said permits from the time of the passage of said Ordinance, to-wit: April 22, 1895, to May 27, 1906, amounted to thirty-five thousand one hundred and five dollars, and that said sums were paid into the treasury of said borough."

Answer. This is found as a fact.

13. Request. "That the total amount appropriated by the Borough of Yeadon to the Board of Health of Yeadon for the support and maintenance of said Board for the years beginning 1895 and ending 1906 inclusive amounted to five thousand, one hundred and seventy-nine dollars and fifty-two cents, and that during any one year no greater sum than five hundred dollars was appropriated for said support and maintenance."

Answer. This is found as a fact.

14. Request. "That the said Board of Health, during the said years beginning with the year 1895 and

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ending 1906 inclusive, did not, during any one year, expend more than five hundred dollars for its complete support and maintenance, including salaries of all officers of said Board and cost of all stationery, postage, etc."

Answer. This is found as a fact.

15. Request. "That the interments in Holy Cross Cemetery between December 18, 1893, (the date of the incorporation of said borough), and April 22, 1895, (the date of the passage of said ordinance) numbered 3233."

Answer. This is not found as a fact for the reason that the evidence adduced by the plaintiff to prove this fact has been excluded, as will hereafter appear.

DISCUSSION.

The analysis of the contention of the plaintiff in this case is this:

First. That he was arrested under a warrant issued by Justice Evans, for a violation of Ordinance No. 9. This is true.

Second. That Justice Evans, on January 25, 1907, found Peter Mallie guilty of the charge and imposed a fine of fifty dollars or five days' imprisonment. This is true.

Third. That the plaintiff paid the fine to avoid imprisonment, and, therefore, has a right to maintain an action to recover it back. This gives rise to the first question for consideration, which will be taken up and considered hereafter.

Fourth. That Ordinance No. 9 is void, being a revenue measure, and the Justice, therefore, had no jurisdiction of the prosecution against him. This gives rise to the

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second question for consideration, and will be hereafter referred to. If all of these questions are to be solved in his favor, it would follow that he would be entitled to recover in this case, unless he would be defeated by objections raised by the defendant, which give rise to the following questions:

Fifth. Were the proceedings and judgment of Justice Evans conclusive in law as a *res adjudicata*?

Sixth. Did Justice Williamson, from whose decision the appeal in this case has been taken, have jurisdiction of this suit?

The first question in the above category is, was the payment of the fine by Peter Mallie such payment as entitles him to maintain a suit for its return?

"A party who, when threatened with a distress, pays an illegal tax under protest and notice of suit, may maintain an action to recover it back."

Grim v. Weissenberg Sch. Dis., 57 Pa., 433.

"It has been held in numerous cases that threats or apprehension of judicial proceedings to enforce the payment of an asserted claim will not prevent the payment from being considered voluntary."

Brewing Co. v. State, 70 L.R.A., 911.

"Where there is no mistake or fraud a voluntary payment cannot be recovered back on the mere ground that the one party was under no obligation to pay and the other had no right to receive."

"Where a party would recover back taxes he is under no legal obligation to pay, he must protest or give notice of his intention to reclaim them."

McCrickert v. Pittsburg, 88 Pa., 133.

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In *Union Insurance Co. v. Allegheny*, 101 Pa., 250, Mercur, J., says:

"In *Dillon on Municipal Corporations*, Section 751, the requisites to maintain an action *ex contractu* against a municipal corporation to recover back money paid to it for taxes are said to be three:

1. The authority to levy the tax must be wholly wanting, or the tax itself wholly unauthorized, so that the tax is absolutely void.

2. The money sued for must have been actually received by the defendant corporation for its own use.

3. The payment by the plaintiff must have been made under compulsion to prevent the immediate seizure of his goods, or the arrest of the person and not voluntarily.

Unless these conditions concur, payment under protest will not give a right of recovery."

"A voluntary payment of money under a claim of right cannot in general be recovered back. There must be compulsion actual, present and potential in inducing a payment by force of process available for instant seizure of person or property, when the party so paying must give notice of illegality of the demand and of his involuntary payment."

"The element of coercion being essential, mere protest or notice will not change the character of the payment, or confer of itself a right of recovery."

Peebles vs. Pittsburg, 101 Pa., 304.

"Money voluntarily paid cannot be recovered back simply because the payment was made under protest. The only effect of a protest is to show the voluntary char-

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acter of a payment procured by duress, and the intent to claim the money back."

"The coercion which will render a payment under protest involuntary, so that it may be recovered back, must consist of duress either of person or goods. A mere denial of an incorporated right by which a man is placed in a dilemma and compelled to choose between conflicting views of the law is not sufficient for that purpose."

De La Cuesta v. Insurance Co., 136 Pa., 62.

To the same effect is Shoenfield v. City of Bradford, 16 Pa. Sup. Ct., 165; also Harvey v. Blank, 119 Pa., 212.

In this conjunction the language of Judge Hare in 136 Pa., 663, is informative: "I may here advert to a class of cases which are governed by a different rule. It is that money paid under the compulsion of legal proceedings cannot be recovered because the effect would be to postpone the decision in the pending suit. Or to state the principle somewhat differently, if the plaintiff could have brought the question to the test of a decision in a mode prescribed by law, the payment is not less voluntary because made under protest."

"The remedy for an unfair or illegal assessment of taxes is by appeal to the County Commissioners. If the party aggrieved neglect it, the collector cannot relieve him, but must collect the tax; and no action lies against the borough to recover back the sum paid, though payment was made under protest."

Wharton v. Birmingham Boro., 37 Pa., 371.

To the same effect is Clinton v. School District, 56 Pa., 315.

"The presumption is that the taxes paid to public officers are applied to public purposes, and taxes so paid

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cannot be recovered back merely because the law under which they are levied is unconstitutional. Where the payment is exacted by duress of the person or distraint of goods, and is made under protest, thus giving notice to the officers that it will be contested, the law will permit taxes illegally collected, to be recovered back; but it never permits such a recovery where the payment was voluntary."

Payne v. School District, 168 Pa., 386, per Noyes, P.J. Affirmed on opinion of lower Court.

"In protesting some notice ought to have been given, formal or informal, that the amount paid would be reclaimed." This is said with reference to tolls paid by a shipper to a Navigation Company.

Navigation Co. v. Wood, 194 Pa., 47.

It will thus be seen from the authorities that the essential features which must exist in order to entitle a person to recover money paid are:

First. The exaction of payment must be unlawful.

Second. Payment must have been made under a present existing and potential pressure against either person or property.

Third. Payment must have been made with the accompaniment of protest, or some other notice of an intention of reclamation.

Turning now to the case in hand, we note that the only proof presented in this case is that Mr. Mallie paid the fine in order to avoid imprisonment. He had been denied by the justice the right to produce proof and contest the validity of the Ordinance under which he was

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arrested. From his standpoint, therefore, his contention had not been heard or considered. His reasonable remedy was to appeal from the decision of the justice and produce his proofs and make contest in court. Within the time prescribed by law for an appeal, he chose to pursue another course. This course led him to an agreement with his adversary by which he procured a settlement of thirty-five other cases in connection with the Harrison case, making thirty-six cases for the payment of one hundred and eighty dollars, which he settled by paying one hundred and thirty dollars and obtaining credit for the fifty dollars which he had previously paid, and which by this suit he now seeks to recover back. At the same time he agreed substantially to make the finding of the justice in the Harrison case final and conclusive by agreeing not to take an appeal or certiorari. There is no evidence of the expression of any intention on his part in these transactions to reclaim the money which he had paid in the Harrison case, or any part thereof.

Therefore, we are irresistibly led to the conclusion that he could not maintain an action for the recovery of the money sought to be recovered in this suit.

Having reached the above conclusion, this would be sufficient for the disposal of this case, except that the Act of April 22, 1874, Section 2, P.L. 109, says:

"The decision of the Court shall be in writing, stating separately and distinctly the facts found, the answers to any points submitted in writing by counsel and the conclusions of law."

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In order to dispose of all the requests or points of the plaintiff and defendant, it is requisite to consider and dispose of other questions in the case.

The next question for consideration relates to the validity of the Ordinance. The plaintiff contends that the Ordinance is totally void, because it is and was intended to be a revenue producing Ordinance; that the municipal authorities were without power to exercise their police function for any other purpose than for police purposes; that the right to tax for revenue is a power distinct from the police power, and is limited by law to the subjects made taxable by statute, which do not include the right to tax burials; that Justice Evans therefore had no jurisdiction either of the subject or of the defendant, and that his proceedings were wholly nugatory.

The department of government to which this Ordinance relates is primarily the maintenance of health, and incidentally the maintenance of the streets, which are used by funerals and the maintenance of peace and good order to and for the increased assemblages of people.

The statutory authority for the primary purpose of the Ordinance is the sixteenth and seventeenth clauses of Section 2 of the Act of April 3, 1851, P.L. 320:

"To prohibit within the Borough the burial or interment of deceased persons, or within such partial limits within the same as they may from time to time prescribe, and to regulate the depth of graves."

"To make such other regulations as may be necessary for the health and cleanliness of the borough."

The incidental purposes take their authority from the following extracts from the Act of 1851:

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"To make such laws, ordinances, by-laws and regulations not inconsistent with the laws of this Commonwealth, as they shall deem necessary for the good order and government of the borough."

"To regulate * * * streets * * * and they shall have all other needful jurisdiction over the same."

There is no specific statutory authority in the municipality to issue licenses or permits for burials. Statutory power is conferred to license exhibitions for amusement, auctioneers and conveyances used for pay. Hence issuing permits for burials must take its authority from the regulating power, and such regulation in respect to burials may by virtue of the statute go to the limit of entire prohibition.

There can be no question but that if this Ordinance was a revenue measure and intended to be such, it is void.

The significant utterance of W. W. Porter, Justice, in *Mann's Choice Borough v. Telegraph Co.*, 21 Pa. Supr. Ct., 438, is suggestive of a call for judicial discrimination to differentiate municipal legislation intended to raise revenue masquerading under the cloak of the police power. He says: "The facts disclosed in the record now before us present a case within the circle of existing precedents, wherefore we are constrained to affirm the judgment, but it may, without impropriety, be again said that there is a point of unreasonableness at which judicial interference in the enforcement of such ordinances is not only warranted, but demanded, on a proper presentation of facts, and that this point of interference is short of actual confiscation of corporate property by municipal legislation under the guise of license fees imposed in the exercise of police power."

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The regulation must not deny equal rights.

Commth. v. Snyder, 182 Pa., 630.

Sayre v. Phillips, 148 Pa., 482.

It must not prohibit but regulate, where there is no express power of prohibition; it must be reasonable in scope, general in application and impartial in operation.

Commth. v. Harmel, 166 Pa., 89.

"But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be reasonable exercise of the power or it will be pronounced invalid."

1 Dillon's Municipal Corporations (4th Ed.)
Sec. 328.

Lower Merion Township v. Telegraph Co., 25 Pa.
Supr. Ct., 306.

Collingdale Borough v. Keystone Co., 33 Pa., 351.

If the license tax is more than is sufficient to pay for the exercise of the police power, the tax cannot be collected because it is imposed for revenue, which is beyond the power of the municipality.

Lower Merion Township v. Telegraph Co., supra.

Under the police power of a borough over its streets, a borough may impose a license tax on poles.

Ridley Park Borough v. Electric Light & Power Co.,
9 Pa. Supr. Ct., 621.

It is a lawful exercise of police power to provide by ordinance against selling or offering for sale at retail upon the streets without the payment of a license fee.

North Wales Borough v. Brownback, 10 Pa. Supr.
Ct., 227; 194 Pa., 609; Mt. Carmel Borough v. Fisher,
21 Pa. Supr. Ct., 643.

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A prohibition of unlicensed peddling which operates impartially, and without distinction between classes, or residents of different several subdivisions, or of different States, is held to be a proper exercise of the police power of the State.

Commonwealth v. Brinton, 132 Pa., 69; Mechanicsburg Borough v. Koons, 18 Pa. Supr. Ct., 131; Commonwealth v. Rearich, 26 Pa. Supr. Ct., 384; Commonwealth v. Gardner, 133 Pa., 284; Commonwealth v. Harmel, 166 Pa., 89.

The burden of establishing the unreasonableness of the ordinance is upon the plaintiff, and he must not only show that it is void, because it is unreasonable, but he must fill the measure of proof that it is so patently unreasonable as to convict the municipal legislature of an abuse of their power.

"The determination of the reasonableness of the amount of the license fee to be charged lies in the discretion of the borough authorities in the first instance. It is not for the courts to determine whether a license fee is reasonable; but whether it is so unreasonable as to demonstrate an abuse of discretion on the part of the authorities fixing the fee."

No. Braddock Boro. v. Telegraph Co., 11 Pa. Supr. Ct., 24; Allentown v. Telegraph Co., 148 Pa., 117; No. Braddock Boro. v. Traction Co., 8 Pa. Supr. Ct., 233; Kittanning Co. v. Kittanning Boro., 11 Pa., Supr. Ct., 31; New Hope Boro. v. Telegraph Co., 16 Pa., Supr. Ct., 306; 202 Pa., 532.

"To justify the court in declaring the ordinance void, its unreasonableness as a police regulation must be clear, manifest and undoubted, so as to be an abuse of discre-

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tion on the part of the borough council. The ordinance must be reasonable and must not be oppressive, and the determination of this question is for the court and not for the jury."

Commonwealth v. Railroad Co., 23 Pa. Supr. Ct., 205; Kneedler v. Norristown; 100 Pa., 368; Reimer's Appeal, 100 Pa., 182; Livingston v. Wolf, 136 Pa., 519; McDevitt v. People's Natural Gas Co., 160 Pa., 367.

It is incumbent on him who alleges the invalidity of an ordinance not invalid on its face to aver and prove the facts which make it invalid for unreasonableness.

West Conshohocken Boro. vs. Electric Co., 29 Pa. Supr. Ct., 7; Kittanning Boro. v. Natural Gas Co., 26 Pa. Supr. Ct., 355; Johnstown v. Central District Co., 23 Pa. 381; Kittanning Boro. v. Armstrong Water Co., 35 Pa. Supr. Ct., 174.

"Municipal corporation which is authorized to regulate any given subject, and to require those who do any act to obtain a license or permit therefor, may charge the person procuring it a reasonable fee to cover the labor and expense attending the issue of such license or permit, although the power to do so is not expressly given in the charter. This is not a tax, nor its exaction an exercise of the taxing power."

City of St. Paul vs. Dow 37 Minn., 20; American State Reports, Vol. 5, page 811.

"The imposition by the councils of Philadelphia of an annual sum on a city railway company's cars as a tax to raise revenue would be an invasion of the chartered rights of the company and void."

"But the imposition of a reasonable charge for a license as a police regulation, although its incidental oper-

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ation should augment the receipts into the treasury, is not invalid."

Johnson v. Phila., 60 Pa., 445.

"The license fee required by this Act (Act of July 2, 1895, P.L. 428, providing for a license fee of two dollars on public lodging houses) is not a tax in the revenue sense. The regulation of matters affecting the public through the medium of a license tax is a recognized exercise of the police power. An example of this is found in **Johnson v. Philadelphia, 60 Pa., 445**, where an ordinance requiring a license fee of thirty dollars for each street car in use was sustained. The license fee of two dollars fixed by this Act is entirely reasonable."

Commth. v. Muir, 1 Pa. Supr. Ct., 578.

"The courts will not declare such ordinance void, because of the alleged unreasonableness of the fee charged, unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities."

New Hope Borough v. Telegraph Co., 16 Pa. Supr. Ct., 306.

In taking into consideration the question of the reasonableness of the license fee ordained in this case, and of the suggested abuse of discretion in the municipal authorities when they ordained it, it is proper to reflect that it was a provision for the future. There was no certainty as to the number of interments which would be made in the borough. There was no certainty but that the number of them might be comparatively limited. The administration machinery by which the permits should be issued had to be provided for. Provision had to be made for supervision to see that the requirements of the ordi-

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nance were carried out. The special provision for contagious diseases had to be made. The number of carriages attending funerals and especially those dying of contagious diseases had to be regulated and enforced. The streets had to be kept in condition for the increased travel. A police supervision had to be used for the maintenance of peace and good order to meet the requirements of the increased gathering of people.

In *Springfield Water Co. v. Darby Boro.*, 109 Pa., 400, the decision of the lower Court was affirmed in which it is said per Hemphill, "nor are we satisfied that the fee is excessive, for, in addition to the clerical labor of preparing, issuing and keeping record of the permits, the excavation, while being made and while open requires for the safety of the public extra police care and supervision, and the expense necessarily entailed should not be imposed upon the tax payers, but be paid by those for whose advantage and profit they are occasioned."

The elements which enter into the consideration of the reasonableness of an ordinance imposing a tax on poles and wires are the necessary or probable expenses incident to the issuing of the licenses and the probable expense of inspection, regulation and police surveillance, and the possible liability of the municipality for accidents caused by the negligent care of the poles and wires.

Taylor Boro. v. Postal Co., 16 Pa. Supr. Ct., 344; 202 Pa., 583; *Schellsburg v. Telegraph Co.*, 26 Pa. Supr. Ct., 343; *Edgwood Boro. v. Scott*, 29 Pa. Supr. Ct., 156; *Pottsville Boro. v. Gas Co.*, 33 Pa., 480.

The testimony of Edward F. Pierce, Secretary of the Board of Health, who was called as a witness by the plaintiff when under cross-examination, is to the effect that in

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addition to the clerical labor of preparing, issuing and keeping record of the permits, provision had to be made to prevent the blocking of streets by funeral processions, the prevention of the commission of nuisance, and limiting the number of carriages in cases of contagious diseases.

The amount of the permit fee in each case is comparatively small.

Nevertheless the fact exists that since the passage of this ordinance, the amount of money received by the borough is greatly in excess of the amount which it has expended in the maintenance of the Board of Health.

What the borough has expended by way of increased amounts in the maintenance of the streets, and the maintenance of police force does not appear. It may be surmised that the expenditures not appearing would not consume the excess of the amount received over what was expended for the Board of Health. But the burden being upon the plaintiff, we ought not to be left to surmise or conjecture in this respect.

In this connection we have been compelled to exclude the proof adduced by the plaintiff of the number of interments in Holy Cross Cemetery prior to the adoption of this ordinance. This evidence is not excluded because it is not germane to the contention, but it is excluded because the vehicles of proof offered are not such as entitles them to be admitted under the rules of evidence. The number of interments prior to the adoption of the ordinance was sought to be proven by the production of a registry book of burials in the cemetery, which was kept at the office of the cemetery in Yeadon. This is a book in the handwriting of a person who is absent. It amounts to

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nothing more, therefore, than his declarations. It is not shown to have been contemporaneous with burials. It is not the book of a religious society so as to bring it within the force of the Act of 1700, 1 Smith's Laws, 20 Purdon's Digest, page 824, pl. 77. It is not a public book. It is not shown to whom the cemetery belongs. It is not shown that it belongs to a corporation, and the defendant had some relation to the corporation. The inscriptions on the tombstones would be admissible in evidence, and this because the public exposure of them gives them a public sanction. A person could have gone over the cemetery, and if these inscriptions show when the burials took place, or show in what year even they took place, this evidence could have been produced. We have, therefore, concluded that the objection to the admission of this registry book should be sustained.

A registry book of permits issued, which was kept at the office of the cemetery in Philadelphia, was also offered. It is mostly in the handwriting of a deceased person. There is nothing which brings it within any rule of admissibility, and the objection to the offer of it is sustained.

Therefore, having before us upon a question wherein the burden of proof is upon the plaintiff the sole fact that the receipts of the borough from this ordinance are greatly more than the moneys expended by it in the maintenance of its Board of Health, we do not feel warranted in determining that this ordinance is void, because of an abuse of discretion by the enacting authorities. We are the more readily moved to this conclusion, because of our judgment that the plaintiff cannot maintain this action for the reasons heretofore stated.

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The next question is one advanced by the defendant. The defendant contends that the proceedings and judgment of Justice Evans are conclusive in law as a *res adjudicata*.

This depends on whether Justice Evans had jurisdiction of the subject or not. If the ordinance is a valid ordinance, he had jurisdiction of the subject and his conclusion would be final.

"It is a well-nigh universal rule that the judgment of a court of competent jurisdiction upon a point litigated between the parties, whether it be a court of record or not, and whether the proceeding in which the judgment was rendered be according to the common law, or summary in its character, is conclusive so long as it remains in full force in all subsequent controversies directly involving the same question."

Marstella v. Marstella, 132 Pa., 517.

On the other hand, if he did not have jurisdiction, and the question under consideration has not been decided, then Justice Williamson did have jurisdiction. If he did not have jurisdiction then his entire proceedings are nugatory.

Where there is a want of authority to hear and determine the subject matter of the controversy an adjudication upon the merits is a nullity, and does not even estop an assenting party.

Matter of will of Walker, 136 N.Y., 20; Beardslee v. Dodge, 143 N.Y., 160; 42 American State Reports, 710.

A collateral attack can be made on a judgment where there is no jurisdiction.

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Ferguson v. Crawford, 70 N.Y., 253; 26 American State Reps, 589; Chenning Canal Bank v. Judson, 8 N.Y., 254; Freeman on Judgments, Section 120.

"When judicial tribunals have no jurisdiction of the subject matter on which they assume to act, their proceedings are absolutely void, but when they have jurisdiction of the subject matter irregularity or illegality in their proceedings does not render them void, but merely voidable."

Town of Wayne vs. Caldwell, So. Dakota, 36 American State Reports, 750.

The fact that the method of procedure by which the adjudication has taken place is not reviewable in a higher court does not vary the rule of *res adjudicata*.

Fraunthal's Appeal, 100 Pa., 290.

"Whenever it does not contradict the record, parol evidence may be given to show that a former recovery was had not upon the merits, but upon some technical objection to the form of action or otherwise."

Follansbee v. Walker, 74 Pa., 306.

"A decree of the Orphans' Court is a nullity if pronounced upon a subject over which the court has no jurisdiction."

"It is not indispensably necessary that the want of jurisdiction shall appear upon the record."

Smith v. Wildman, 178 Pa., 245.

The only remaining question arises from the contention of the defendant that Justice Williamson had no jurisdiction of this suit, or stated generally, a justice of the peace has no jurisdiction of an action brought to recover moneys paid under duress, with notice of reclamation.

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The jurisdiction of a justice in debt is limited to matters of ordinary contract express or implied.

"A justice of the peace has not jurisdiction of debt for the penalty imposed by the Act of the 13th of April, 1791, for not entering satisfaction of a judgment."

Zeigler vs. Gram, 13 S. & R., 102.

The opinion in this case was delivered by Gibson, J., who says: "But in jurisprudence the word contract is generally used to denote a bargain or agreement; and it is plain, that in these acts of assembly it was used in that sense by the legislature, who had in view those contracts that arise immediately out of a course of dealing between the parties, and not that sort of contract that arises remotely out of the compact of government."

Judge Gibson puts this decision upon the ground that whether a penalty is intended as a compensation for damages sustained, or as a punishment to compel the performance of an act, a suitor could not know with any definiteness the amount of recovery, and would not be able to select his forum, and make affidavit in advance in support of his selection.

A justice of the peace has no jurisdiction in debt against a sheriff for an escape; Schaffer v. McNamee, 13 S. & R., 44; nor on a sheriff's bail bond; Commth. v. Reynolds, 17 S. & R., 367; nor an action for damages for negligence in doing work under a contract; Zell v. Arnold 2 P. & W., 292; nor an action against another justice for money collected in his official capacity; Montgomery v. Poorman, 6 W., 387; nor an action on the judgment of a justice of another State; Ellsworth v. Bartow, 7 W., 314; nor an action against a constable for not paying rent in arrear out of the proceeds of an execution; Seitzinger v.

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Steinberger, 12 Pa., 380; nor an action of debt for a failure to obey a police regulation ;Pittsburg v. Daly 5 Pa. Supr. Ct., 528.

On the other hand, he has jurisdiction of a suit by an officer to collect his fees; Kennedy v. Hughey, 3 W., 265; also of an action to recover costs paid where there had been a suit before a justice, an appeal by the defendant, case ruled to arbitration and an appeal from the award of arbitrators, wherein it was finally decided that the justice had no jurisdiction; Lyon v. McManus, 4 Binney, 167; also of an action to recover costs incurred before a justice wherein it was finally determined that he had no jurisdiction; Nagle & Co. v. Grale, 26 Pa., C.C., 198.

“When a person in an official capacity extorts money or charges exorbitant fees, the action for money had and received will lie to recover it back.”

Riley v. Willis, 5 Wh., 145.

A person was arrested for violating a borough ordinance. Burgess threatened to impose fine and imprisonment. Money paid. Ordinance declared illegal in another suit. Suit can be sustained against the borough to recover back; especially because Burgess promised a return of the money if the ordinance should be declared illegal.

Pace v. Plymouth Boro., 7 Kulp, 239.

Where a horse was loaned to another who promised to take good care of him, and the horse was injured, a suit will be sustained for the recovery of the damages for the injury.

Murphy v. Thall, 17 Pa. Supr. Ct., 500; Crosky v. Wallace, 22 Pa., C.C., 112.

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In the light of the above authorities, we are of opinion that the implied undertaking of one to return moneys illegally coerced from another and paid under protest is within the jurisdiction of a justice of the peace.

Answers to plaintiff's requests for Conclusion of Law.

1. Request—"The said ordinance is and has been from the time of its passage a revenue producing measure and therefore void."

Answer—This is declined.

2. Request—"The plaintiff, Peter Mallie, having paid the said fine of fifty dollars under duress of person, the same may be recovered back."

Answer—This is declined.

3. Request—"The Council of the Borough of Yeadon, having had no power to pass the said ordinance, the same is therefore void, and the Justice of the Peace at Yeadon was without jurisdiction to impose a fine for a failure to observe it."

Answer—This is declined.

4. Request—"The number of interments in Holy Cross Cemetery, from December 18, 1893 (the date of the incorporation of said Borough) to April 22, 1895, (the date of the passage of said ordinance) being 3233, the Council and officers of said Borough were charged with notice that any ordinance that should be passed requiring a permit for each interment for which a fee of one dollar should be exacted, would exceed the cost of issuing said permit, and would be a revenue enactment and therefore void *ab initio*."

Answer—This is declined.

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5. Request—"The said ordinance was passed with the intent and for the purpose of raising revenue, and is therefore void."

Answer—This is declined.

6. Request—"It was not within the police power of said borough to pass said ordinance, and the same is therefore void."

Answer—This is declined.

7. Request—"The Legislature has not authorized or empowered said borough to pass any ordinance requiring that a fee of one dollar shall be paid for a permit to bury the deceased body of a human being in said borough, and the said ordinance is therefore void."

Answer—This is declined.

8. Request—"The Legislature has not authorized or empowered said borough to pass any ordinance requiring that a fee of one dollar shall be paid for a permit to inter the deceased body of a person who died outside the limits of said borough and whose body was brought into said borough for interment, and the said ordinance is therefore void."

Answer—This is declined.

9. Request—"Judgment should enter in favor of the plaintiff for the full amount of his claim with costs."

Answer—This is declined.

Answers to defendant's points.

1. Point—"The remedy of the plaintiff if he was dissatisfied with the judgment entered by Justice Evans was to appeal, or have the record reviewed by certiorari. He would have no right to pay the judgment and

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costs and begin suit before another justice of the peace to recover it."

Answer—If Justice Evans had jurisdiction, the remedy of the defendant was to appeal or have the record reviewed by certiorari. If he did not have jurisdiction, and the plaintiff paid the fine and costs under duress, with notice of reclamation, he could sue before another justice of the peace and recover it back.

2. Point—"The agreement for settlement entered into January 30, 1907, Exhibit A, for identification (D. B. N.) together with the fact that no money was paid to the borough officials in the Harrison case until after the terms of said agreement had been complied with precludes a recovery in this case."

Answer—This is affirmed.

3. Point—"Under all the evidence, the judgment should be for the defendant."

Answer—This is affirmed.

CONCLUSION:

It is ordered that unless exceptions shall be filed to this decision within thirty days after notice, in accordance with the second section of the Act of April 22, 1874, judgment shall be entered in favor of the defendant and against the plaintiff with costs.

From the Weekly Reporter, Chester, Pa.

Milton Swartley v. William D. Burkert

Suit was brought before a Justice of the Peace on May 29, 1899, and judgment entered thereon on June 5, 1899, in favor of plaintiff. A transcript of the record was filed in the C.P., on May 13, 1908, and a Scire Facias to revive and an attachment execution issued on the same day. On June 4, 1908, defendant moved to strike off the judgment, upon the grounds, first, that the record did not disclose any cause of action over which justice had jurisdiction, and, secondly, that the record did not show that any evidence was given. Held, that it might well be that the record showed such irregularities, that, on certiorari, it would have been set aside; but at this late day, the judgment could not be disturbed in a collateral proceeding, and the method for an attack upon a judgment before a justice is by certiorari.

Where a justice has jurisdiction of the person of the defendant and the subject matter in controversy, any irregularities in the proceedings before him must be taken advantage of by certiorari.

The Court will not be zealous to help defendant where his application shows great laches, and an effort to escape payment of a debt he admits he could not defend before the justice.

**JURISDICTION—LACHES—STRIKING OFF JUDGMENT—
RECORD.**

No. 287, March Term, 1908, C.P. of Montgomery Co.

Motion to strike off judgment from the record, the same having been entered on the transcript of a Justice of the Peace.

Henry M. Brownback, Attorney for Plaintiff.

H. I. Fox, Attorney for Garnishees.

Opinion by Aaron S. Swartz, P. J.

OPINION.

Suit was brought before a Justice of the Peace on May 29, 1899. The hearing was had on June 5, 1899.

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The plaintiff appeared, but the defendant failed to appear. Judgment was entered for the plaintiff. A transcript of the record before the Justice was filed in the Common Pleas on May 13, 1908. On the same day the plaintiff issued a scire facias to revive the lien and also an attachment execution.

On June 4th, 1908, the defendant moved to strike off the judgment. Two grounds are alleged in support of the application. First, that the record does not disclose any cause of action over which the justice had jurisdiction, and, secondly, that the record does not show that any evidence was given.

The plaintiff moved to amend the record filed on May 13, 1908, so as to make it conform with the actual record on the docket of the justice. There is no allegation that the proposed amendment is not in accordance with the true record found on the docket of the justice. We inspected the docket and are satisfied that the new justice who followed the officer before whom the case was heard, made a mistake in the original transcript filed, May 13, 1908. The judgment is founded upon the record of the justice and the transcript should be made to truly present that record, and an amendment will be allowed to correct the mistake. *Justice v. Meeker*, 30 Pa. Supr. Ct., 209. In the case cited, the amendment was allowed, although the transcript showing the mistake had been filed in the office of the Prothonotary, ten years before it was corrected.

The transcript, as amended, shows a summons for a debt not exceeding Three Hundred Dollars, and that the claim is for \$94.30, with interest from October 15, 1897. The suit was brought May 29th, 1899.

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There was personal service on the defendant, and the constable so returns under oath. The transcript also states that there was a hearing on June 5th, 1899, and that the plaintiff appeared and that the defendant did not appear. Judgment was publicly entered the same day in favor of the plaintiff for One Hundred and Three and 57-100 Dollars, with costs of suit in default of defendant.

The defendant, in his application, does not allege a failure of service, nor that he did not owe the money, nor that he did not know that the judgment was entered against him by the justice. The uncontradicted facts, disclosed at the hearing on the rule, are, that the suit was upon a promissory note; that the defendant did not appear before the justice because "he had no money, and therefore there was no use for his presence." He asked the plaintiff to make no more expense and he would settle the claim on June 6, 1908. The counsel for plaintiff agreed to grant the delay, but before the appointed day of settlement arrived, and without any previous notice to plaintiff or his counsel, the application was made to the court to strike off the judgment. The defendant delayed for nearly nine years, and then moved to escape execution process and the payment of his debt.

Where a justice has jurisdiction of the person of the defendant, and the subject matter in controversy, any irregularities in the proceedings before him must be taken advantage of by certiorari. Having permitted the judgment to stand unquestioned for nine years, the defendant must be held to have waived the irregularities.—*Inquirer Printing Co. v. Wehrly*, 157 Pa., 415; *Justice v. Meeker*, 30 Pa., Supr. Ct., 207.

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That there was jurisdiction over the defendant, by the service, cannot be questioned. There was a hearing, and this implies that there was evidence taken in due form under oath or affirmation. But even if the record did not show that evidence was taken, it would not show sufficient ground to strike off the judgment.—*Inquirer Printing Co. v. Wehrly*, 157 Pa., 415; *Saxon v. Perkins*, 19 County Court Rep., 50; *Dorner v. Staley*, 2 Dist. Rep., 332; *Cockley v. Rehr*, 8 Montg. Law Rep., 201.

The statement that the cause of action is summons in debt, not exceeding Three Hundred Dollars, on a claim for \$94.30 with interest from October 15, 1897 to June 5, 1899, does not so clearly show want of jurisdiction over the subject matter as to call for striking off the judgment at this late day. The judgment of the justice stood for nine years. The defendant knew the character of the claim. The facts disclosed before us show that it was a proper cause of action for the jurisdiction of the justice and it would be a serious hardship to set aside the judgment after the plaintiff's claim may be barred by the statute of limitations. It may well be that the facts disclosed, in the uncontradicted answer to the rule, cannot be used to support the transcript, but they do show that the defendant's application has no merit or equity. We shall not be zealous to help the defendant where his application shows great laches and an effort to escape the payment of a debt he admits he could not defend before the justice.

There are, no doubt, cases where the judgments were stricken off, because the transcripts disclosed that the judgments were void and not merely voidable. An examination of these cases reveals the fact that the jurisdic-

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tion defect was so evident that no inference could be fairly drawn from the language of the transcript, in support of the jurisdiction. In *Pantall vs. Dickey*, 123 Pa. 431, the transcript disclosed that the defendants were non residents. The short summons was not used, and clearly there was no lawful writ upon which a valid judgment could rest. The judgment was void. In *McKinneg vs. Brown*, 130 Pa. 365, there was an attempt to sustain a judgment against a married woman when no evidence was taken. The judgment was void because a married woman could not, under act of 1848, be held without proof that she contracted the debt and incurred it for necessities. In *Murdock vs. Wasson*, 158 Pa. 295, the judgment was void against a married woman because the record showed that the husband made the contract and there was no evidence whatever to hold the wife. "Summons for debt not exceeding \$300, on a claim of \$94.30 with interest," is not a statement showing that the cause of action was not within the jurisdiction of the justice. Summons for debt, ordinarily, means an action for money due on a contract. In *Inquirer Printing Co., vs. Wehrly*, 157 Pa. 415, the motion was to strike off the judgment. The transcript showed that the action was a summon in debt not exceeding \$100. No evidence was taken. The motion was denied and the rule was discharged. In *Ma-Kibbin vs. Black*, 33 County Court Rep. 516, the transcript stated C. S. assumpsit debt \$12.08. Even on certiorari the Court refused to strike off the judgment or reverse the proceedings, although the exception was filed that the record failed to show a cause of action so as to give the justice jurisdiction.

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It may well be, that the record before us shows such irregularities that on certiorari it would have been set aside, but at this late day we cannot disturb the judgment, in a collateral proceeding. The law points out the direct method for an attack upon a judgment before a justice and that proceeding is certiorari.

And now October 5, 1908, the rule to strike off the judgment is discharged.

Leaman, et al., v. Lancaster County
Mutual Insurance Company

The proceedings of an alderman will be set aside on certiorari, where it appears that the summons was not served by the constable of the township where the defendant company had its office, although the constable's costs endorsed on the writ were the same as the constable of the said township would have been entitled to.

A justice can amend a constable's return in accordance with the facts, but he should note on the return that it was amended by him.

JUSTICES OF THE PEACE—SERVICE OF SUMMONS—CONSTABLES' COSTS—ACT OF MARCH 20, 1810, SEC. 48, 5 SM. L. 162.

No. 49, May Term, 1908, C.P. of Lancaster County.

Certiorari.

Chas. W. Eaby, for Certiorari.

E. M. Gilbert, Contra.

Opinion by Hassler, J. June 27, 1908.

OPINION.

The first and second exceptions to the justice's record are to the effect that the summons was not issued to the constable of the township where defendant resides, which in this case is where its office is located, nor to the next constable most convenient. That this is a fact is clearly shown by the depositions.

The Act of 20 March, 1810, 5 Smith 162, Sec. 48, provides that a justice must direct a summons "to the constable of the township, ward or district where the de-

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fendant usually resides or can be found, or to the next constable most convenient to the defendant." The defendant in this case is an insurance company having its office in Paradise Township, Lancaster County. The constable to whom the summons was issued lives in the third ward of Lancaster City. There is a constable residing in Paradise Township, and a number very much more convenient to the defendant's office than the constable to whom the summons was directed. The defendant did not appear at the hearing. Under such circumstances it has been frequently decided that the justice does not acquire jurisdiction. The last case on this subject, in which others are cited, is one of this court—Yost vs. Yost, No. 1, 25 L. L. R. 54. In that case, as well as in others, it is stated that the reason for the Act of Assembly is that the defendant might be put to large and unnecessary costs if the subpoena was given to a constable residing at a great distance from his residence, and this appears to have been understood by counsel for the plaintiff as well as the justice to mean that if the costs are the same as they would be if the summons had been directed to the proper constable, the Act does not apply. This is a mistaken view of the law, and under no circumstances can he direct a summons to any but to those designated. The constable's costs, as appears on the return, are the same as those which the constable of Paradise Township would have been entitled to. This, however, does not include the constable. If we should confirm the justice's proceedings the constable could have all the fees he earned in serving the summons made part of the costs, and the same would have to be paid before the judgment could be satisfied. We mention this to show

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that even though the law is, as understood by the justice, there is nothing on the record or before the Court to show that the defendant would not be subjected to greater costs by reason of the summons having been directed to a constable other than one of those designated in the Act of Assembly. In *Yost vs. Yost*, No. 2, 25 L. L. R. 54, we decided that the Act of 1810 is not repealed by the Act of July 9, 1901, P. L. 16.

We are of the opinion that the return of service complies with the Act of Assembly, and that the justice could amend the return of the constable in accordance with the facts at any time, if he did do so, as is alleged by counsel for defendant. The proper way would have been for him to have noted on the return that it was amended, by changing it or adding to it, in accordance with the facts, but so long as the return has only been changed to agree with the facts, the defendant suffers no harm by the amendment, and it was within the powers of the justice to make it. The third and fourth exceptions are therefore without merit, and we dismiss them.

The first and second exceptions we sustain, and the proceedings of the justice are set aside.

From Lancaster Law Review.

Christiana Borough School District v. Sadsbury
Township School District

The Act of March 16, 1905, P.L. 40, providing that children residing in school districts where there is no high school may attend a high school in another district and their home district shall pay for their tuition and books, is not unconstitutional.

Said Act does not conflict with Section 9 of Article 1 of the Constitution, as it does not involve a deprivation of property, nor with Section 17 of Article 1, as it does not impair the obligation of a contract.

School districts are but agents of the Commonwealth and are made quasi-corporations for the sole purpose of the administration of the Commonwealth's system of public education.

CONSTITUTIONAL LAW—ARTICLE 1, SECS. 9 AND 17 OF
CONSTITUTION—ACT OF MARCH 16, 1905.

No. 93, August Term, 1907, C.P. of Lancaster County.

Rule for judgment *non obstante veredicto*.

W. U. Hensel, for Defendant and Rule.

Coyle & Keller, Contra.

Opinion by Hassler, J. June 27, 1908.

OPINION.

This is an action by the plaintiff, to recover the amount, claimed to be due from the defendant for the attendance of children residing in defendant school district at the High School of the plaintiff district. At the trial we directed a verdict for the plaintiff, reserving the question of law whether under the law and the evidence the plaintiff was entitled to recover, and granted this rule to show cause why judgment should not be entered for the defendant, on the point reserved, *non obstante veredicto*.

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The Act under which the plaintiff claims the right to recover is that of 16 March, 1905, P.L., 40, and provides "That children residing in school districts in which no public high school is maintained may attend the high school in some other district located near their homes; * * * the cost of tuition and school books * * * shall be paid to the district receiving such children out of the moneys raised by taxation for public school purposes in the district in which said children reside * * *." It is conceded that the Act has been strictly complied with by the plaintiff and that the amount of the verdict is what the plaintiff is entitled to according to its terms.

The defendant contends that the Act under which plaintiff claims, is unconstitutional, in that it conflicts with both Article I, Section 9, and Article I, Section 17, of the Constitution of Pennsylvania, the first of which provides that no person shall be deprived of his life, liberty, or property unless by the judgment of his peers or the law of the land; and the second that no law impairing the obligation of a contract shall be passed. No property is taken from any one by the Act of Assembly in question. It simply directs what shall be done by the Commonwealth's agent, namely, the school board, with the money raised by local taxation for school purposes; nor does it impair the obligation of any contract, for none is involved in the payment of the share of the expense of maintaining the high school of one school district by another school district, which does not maintain such a school for pupils of the latter district attending such school. The right given to the Legislature to enact such legislation as this Act, and to impose the liability on certain school dis-

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tricts which it does, seems so clear as to make it unnecessary to further discuss the defendant's objections to it.

Article 10, Section 1, of the Constitution of Pennsylvania, provides, that "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose." This Section of the Constitution authorized the passage of the Act of 28 June, 1895, P.L. 413, which enables any school district in the Commonwealth to establish a high school, and directs how it shall be regulated and conducted. As many of the districts did not take advantage of the right to establish and maintain such high schools, so that all the children of the Commonwealth could be educated in them, the Legislature, by Act of Assembly under which the plaintiff here claims (16 March, 1905, P.L., 40), provided that the children of such districts might be so educated and how the cost should be ascertained and paid. In the City of Erie vs. Fuess, 98 Pa., 600, Justice Trunkay says that a school district resembles more mere agents of the State than corporations. In Ford vs. Kendall Borough School District, 121 Pa., 543, Chief Justice Gordon says: "But independently of what is here intimated, we may assert positively, and without hesitation, that school districts are but agents of the Commonwealth, and are made quasi-corporations for the sole purpose of the administration of the Commonwealth's system of public education. * * * Here is not only an injunction upon the Legislature to provide a system of public education"

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for all the children of the Commonwealth, over the age of six years, but to appropriate for that purpose the magnificent sum of not less than one million of dollars. The appropriation may exceed that sum to any amount; to an amount sufficient to cover the entire expenses of the system, but at all events, that sum must be so appropriated. If then this is not strictly and exclusively a State institution, a great public charity, we know not by what name it can properly be designated. That the Legislature has seen fit to have part of the money required for school purposes raised by local taxation, can not alter the character of the institution; it is nevertheless public money as much so as that which comes directly from the State treasury." This case also decides that the money raised by local taxation can only be used for the purposes designated by the Legislature. The Act under which the local tax is raised provides that it shall be to "keep the schools of the district in operation, &c." This the Legislature can and has changed in the Act of 1905, by providing that it shall also, under certain circumstances, be used to pay a share of the cost of maintaining a high school in another district.

The school district of Sadsbury Township in collecting the local tax for school purposes simply acted as the agent of the State, and in directing that part of such local tax shall be paid to a neighboring school district for the support of its high school, when some of the children of said district attend such high school, was certainly not exceeding the power given by the Constitution to the Legislature, to provide for the maintenance and support of a system of public schools wherein the children of the

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Commonwealth shall be educated. As we have said in imposing this liability upon a school district which did not maintain such high school and did send its pupils to a neighboring high school, the Legislature was not depriving Sadsbury School District of property without trial by jury or the law of the land, but was directing that money which the Legislature, under power given by the Constitution, directed should be raised for school purposes, should be paid for the support of the system of public schools which it had established, and, as we have said, no contract was involved, the obligation of which is impaired by this Act of Assembly. We are firmly convinced that in enacting the law, the Legislature acted within its powers, that the law is constitutional and that the plaintiff is entitled to recover.

This Act has been sustained by other courts in the following cases: Honesdale School District v. Bethany School District, 16 D. R., 996; Coatesville School District v. Newlin School District, 32 C. C., 400; Muncy School District v. School District, 5 Just. Law Rep., 185; McConnellsburg School District v. Ayr Township School District, 6 Just. Law Rep., 172, and the School District of the Borough of Lansdale v. School District of Lower Salford Township, 24 Montgomery Co. Law Rep., 81.

The rule to show cause why judgment should not be entered on the point reserved *non obstante veredicto* is discharged, and judgment directed to be entered for the plaintiff on the verdict.

—From Lancaster Law Review.

Commonwealth v. Dulaney

Where the offense for which a fine may be imposed in summary proceedings is a violation of an Act of Assembly, the action must be brought in the name of the Commonwealth.

A complaint alleging a violation of both a borough ordinance and an Act of Assembly is defective, but the defect is cured where the defendant appears, pleads and is tried by the justice on one of the offenses charged.

Where the distance traveled is less than a mile, the magistrate will take judicial notice of the divisions of time, in summary proceedings for violation of a speed law when the statement of time in the complaint is the same as charged in the act although in other words.

A summary conviction for violation of the provisions of the Act of April 19, 1905, without specifying any particular provision of the act is sufficient, the whole record showing the nature of the offense.

The judgment of a magistrate will not be reversed on certiorari because incompetent testimony was admitted without objection.

SUMMARY CONVICTION—VIOLATIONS OF ORDINANCES
AND ACTS OF ASSEMBLY—JUDICIAL NOTICE—SUFFICI-
ENCY OF RECORD—INCOMPETENT EVIDENCE.

No. 55, May Term, 1907, C.P. of Lancaster County.

Certiorari.

John E. Snyder, for Certiorari.

M. E. Musser, Contra.

Opinion by Hassler, J. January 18, 1908.

OPINION.

1. The first exception to the record of the justice is that all the proceedings are "as in cases of misdemeanor as if there was a prosecution under the criminal law instead of a proceeding for the collection of a fine or penalty under a borough ordinance and an Act of Assembly."

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At the argument it appeared that the objection to the proceedings as embodied in this exception is that the proceeding is in the name of the Commonwealth and not in the corporate name of the Borough of Mountville, which is entitled to the fine in case of conviction. The complaint charged the defendant with the violation of a borough ordinance and of an Act of Assembly. The latter provides that any person "violating any of these provisions of this Act shall be subjected to a fine or penalty not less than \$10 nor more than \$25, to be collected by summary conviction before any magistrate or justice of the peace, as like fines and penalties are now by law collectible." And also "All fines and penalties collected under the provisions of this Act shall be paid to the city, borough or township treasury wherein the offence is committed, etc."

Proceedings for the collection of fines or penalties under ordinance must be brought in the corporate name of the municipality entitled to them. This is required by the Act of 15 April, 1835, P.L. 292, Sec. 7; *Sell v. Com.* 1 Mont., 177; *Kensington v. Glenat*, 1 Phila., 251; *Chief Burgess of Marietta, et al., v. Heistand*, 22 L. L. R., 310. But where the offence for which the fine may be imposed is a violation of an Act of Assembly, even though the fine is to be paid in whole or in part to the informer or a municipality, the action must be brought in the name of the Commonwealth: *Van Swartow v. Com.*, 24 Pa., 131; *Specht v. Com.* 24 Pa., 103; *Com. v. Borden*, 61 Pa., 272. As the conviction here was for an offence under an Act of Assembly, the proceedings were properly instituted in the name of the Commonwealth.

2. The second exception is that the complaint sets forth an alleged violation of an Act of Assembly and of

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a borough ordinance. The justice could not convict the defendant of two offences charged in one complaint. Such a complaint would be defective. The defendant, however, appeared before him at the time fixed for the hearing, plead to the complaint without making any objection to it, was tried and convicted of but one of the offences charged in it, namely, the one under the Act of Assembly. As in the case of indictments, this cured the defect in the complaint, and that part of it which charged a violation of the borough ordinance will be regarded as surplusage.

3. The Act of Assembly provides that a motor car shall not be operated at a speed greater than a mile in six minutes. Both the complaint and record of the justice set forth that the defendant operated a vehicle at a speed exceeding ten miles an hour. This is made the subject of the third exception, and is based on the fact that the distance traveled was less than a mile. The charge in the complaint is that he operated the car at a speed greater than a mile in six minutes. Courts will take judicial notice of the divisions of time as well as of days and hours, and when the statement of the time is the same as charged in the Act, even though, in other words, it is sufficient.

4. The sixth exception is that the conviction is for a violation of the provisions of the Act of 19 April, 1905, without specifying what particular provision of the Act the defendant was convicted of.

The complaint charged the defendant with on a certain day "operating a motor vehicle within the limits of the Borough of Mountville at a speed exceeding ten miles per hour in violation of the borough ordinance and the Act of April 19, 1905." There can be no conviction

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of the defendant in manner and form as he is charged in the complaint, as he is charged with the violation of both a borough ordinance and an Act of Assembly. The justice, therefore, could not enter on his record that the defendant was so convicted, but as the defendant waived the duplicity in the complaint by appearing, pleading, and submitting to trial, it became necessary for the justice to specify on which of the two charges he was found guilty and convicted. While there are a number of offenses set forth in the Act of Assembly it is clear that the justice's conviction as it appeared in the transcript taken in connection with the complaint and the whole record, including the testimony, is only for the one which makes it an offence to operate a motor vehicle at a speed greater than a mile in six minutes, and the mention of the Act in the judgment of conviction is only for the purpose of identifying the offence of which the defendant was found guilty as charged in the complaint. This view of the law, we think, is fully justified by the case of *Com. v. Burkhart*, 23 Pa., 521.

5. The eighth exception is to the admission of incompetent testimony at the trial. The testimony complained of was an affidavit of the borough surveyor as to the distance between certain points in the borough. No objection was made to this at the time. In fact, it appears from the copy of the testimony returned that the defendant's counsel approved of the admission of this affidavit. Where irrelevant or incompetent testimony is admitted without objection, the judgment will not be reversed on certiorari: *Perot v. Harley*, 1 Brewster, 407; *Rickets v. Goldstein*, 24 C.C., 1.

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Of the remaining exceptions filed some are, in our opinion, without merit, and do not require discussion, while others raise the same questions, in another form, as are raised in the exceptions which we have considered above. We dismiss all the exceptions and confirm the proceedings of the justice.

Exceptions dismissed.

—From Lancaster Law Review.

Commonwealth v. Herr, et al.

A teacher in the public schools may wear a dress indicating that she is "a member of a religious order, sect and denomination."

The Act of June 27, 1895, P.L. 395, to prevent the wearing of a religious dress, etc., by a public school teacher, and imposing a fine on school directors for permitting the same, is unconstitutional, being contrary to Sections 3 and 4, Article I, of the Constitution of Pennsylvania forbidding religious discrimination.

SCHOOL LAW—TEACHERS—RELIGIOUS DRESS—ACT OF
JUNE 27, 1895—CONSTITUTIONAL LAW, ARTICLE I,
SECTIONS 3 AND 4 OF STATE CONSTITUTION.

No. 26, April Sessions, 1908, Q.S. Lancaster County.

Indictment for violation of religious garb act.

Demurrer.

W. U. Hensel and Isaac R. Herr, for Demurrer.

John E. Malone, J. W. Johnson, District Attorney, and
S. V. Hosterman, Assistant District Attorney,
Contra.

Opinion by Landis, P.J. August 15, 1908.

OPINION.

In my opinion, the question here presented is not, as has been stated, a new proposition. It is, I think, in principle, only the old controversy of *Hysong v. Gallitzin Borough School District*, 164 Pa., 629, under another form. If that case was properly decided (and I believe it was), I cannot see how there can be any serious difficulty in determining the present dispute. There, it was attempted to reach the result by judicial decision; but, that

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having failed, the aid of a legislative enactment was sought to accomplish the same end. If, however, the Constitution in the one case was a bar to a decree, it must prove equally effective as against the Act of Assembly subsequently passed.

The facts of the case are few and easily understood. The above-named defendants constitute the Board of School Directors of Mount Joy Township, and it is charged in the indictment that, as such, they unlawfully and wilfully employed, and do maintain, a teacher, by the name of Lillie Risser, in a public school of the School District of Mount Joy Township, who, while engaged in the performance of her duty as teacher, wears a dress or insignia which indicates that said teacher is a member and adherent of a religious order, sect and denomination. It is also charged that the said directors, knowing that the said teacher was wearing a dress and insignia as aforesaid, and after due notice of the same had been given to them by one, A. W. Garman, failed to suspend the said teacher from employment for the term of one year. The young lady teacher above-mentioned is of the Mennonite faith, and wears at all times the usual plain dress of that denomination. Is she, for this reason, to be deprived of her position? If the Act of June 27, 1895, P.L. 395, is constitutional, it follows that school directors must remove all such teachers or pay the penalty therein prescribed, and the demurrer here filed to this indictment must then be over-ruled; but, if the Act is unconstitutional, the prosecution must necessarily fall.

The title of the Act of 1895 recites that it is "An Act to prevent the wearing in public schools of this Commonwealth, by any of the teachers thereof, of any dress,

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insignia, marks or emblems indicating the fact that such teacher is an adherent or member of any religious order, sect or denomination, and imposing a fine upon the board of directors of any public school permitting the same," and Section 1 declares "that no teacher in any public school of this Commonwealth shall wear in said school, or whilst engaged in the performance of his or her duty as such teacher, any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination." Section 2 directs "that in case of violation of the provisions of the first Section of this Act by any teacher employed in any of the public schools of this Commonwealth, notice of which having been previously given to the school board employing such teacher that it shall be the duty of such school board to permanently suspend such teacher *for* (from) employment in such school for the term of one year, and in case of a second offense by the same teacher it shall be the duty of said school board to permanently disqualify such teacher from teaching in said school; and any public school director failing to comply with the provisions of this Act shall be guilty of a misdemeanor and shall be punishable, upon conviction of the first offense, by a fine not exceeding one hundred dollars, and in case of a second conviction *or* (for) the violation of the provisions of this Act, the offending school director shall be punished by a fine not exceeding one hundred dollars and shall be deprived of his or her office as a public school director. A person thus twice convicted shall not be eligible to appointment or election as a director of any public school in this state within a period of five years from the date of his or her second conviction." It

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will be seen that the Act is incorrect in at least two places in verbiage, and is crudely and inartificially drawn; but I do not think it necessary to discuss this phase, as questions of more importance have arisen.

The objections suggested by counsel are five-fold: First, it is said that the Act is contrary to and in violation of the Third Section of Art. III of the Constitution of this State, which forbids the passage of an Act the subject of which is not clearly expressed in its title; second, that it is violative of the fifth amendment of the federal Constitution, in depriving the citizen of his property by fine and of his office by forfeiture, in that it subjects the individual school director to punishment for the acts of his associates as a corporate entity, when in fact he may not be in any way responsible for them; third, that it is contrary to the provisions of the Constitution of this state, which declares, in Art. I, Sec. 2, the inherent and indefeasible right of all men to acquire and possess property and pursue their own happiness; fourth, that it violates Sec. 3, Art. 1, which declares that "all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; * * * no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given, by law, to any religious establishments or modes of worship;" and, fifth, that it also violates Sec. 4, Art. I, which declares that "no person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth." The last objection

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seems to me to be the most important, and is the only one which will be discussed.

Judge Cooley, in his treatise on Constitutional Limitations, says that "a careful examination of the American constitutions will disclose the fact that nothing is more fully set forth or more plainly expressed than the determination of their authors to preserve and perpetuate religious liberty, and to guard against the slightest approach towards the establishment of an inequality in the civil and political rights of citizens, which shall have for its basis only their differences of religious belief.

The American people came to the work of framing their fundamental laws after centuries of religious oppression and persecution, (sometimes by one party or sect and sometimes by another), had taught them the utter futility of all attempts to propagate religious opinions by the rewards, penalties or terrors of human laws." (Page 571.) Therefore, universal toleration was established as a fundamental rule of this province and state, and Penn's charter asserted absolute freedom of conscience and tolerated all religions alike before the law. To Quaker Pennsylvania, men of all nations, oppressed for opinions' sake, fled, as to a haven of refuge. In the declaration of rights, contained in the Constitution of 1790, Sec. 4, Art. IX, first appears the provision that "no person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth." This Section was re-adopted in the amendment of 1837-38, and, without change, was subsequently placed in the Constitution of 1874, as Sec. 4, Art I. It was substantially a reiteration.

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of the second Section of the declaration of rights included in the Constitution adopted September 28, 1776, and has, therefore, ever been the fundamental law of this state.

If, then, no person, on account of his or her religious sentiments, shall be disqualified to hold any office or place of trust or profit under this commonwealth, ought these directors to be convicted and fined for permitting Miss Risser merely to wear a garb indicative of her religion? She was evidently examined by the County Superintendent and received a certificate attesting her competency to exercise the profession of a teacher, and no complaint is made concerning her ability or morality. It is not alleged that she does not acknowledge the being of a God and a future state of rewards and punishments, nor is it complained that she has ever used her school to impart to her scholars sectarian instruction. The Act of 1895 does not, of itself, remove her from her position, but it directs the directors to dismiss any teacher wearing a religious garb, and punishes the directors themselves if they fail to remove such a teacher. It is, therefore, on account of her religious views that she is to be removed from her employment. The position of a public school teacher is, I think, one "of trust or profit under this commonwealth," for the state regulates the schools and makes large appropriations for their support. If, then, under the Constitution, no person is disqualified on account of his or her religious sentiments, from holding any place of trust or profit under the commonwealth, the Legislature had no power to abridge this constitutional right, and it follows that the Act of Assembly attempting to do so is nugatory and void.

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In *Hysong v. School District*, *supra*, Mr. Justice Dean, in discussing the right of a Sister of Charity of the Catholic denomination to wear her religious garb in the school, has convincingly put the question. He says: "It may be conceded that the dress and crucifix impart at once knowledge to the pupils of the religious belief and society membership of the wearer. But is this, in any reasonable sense of the word, sectarian teaching, which the law prohibits?" The religious belief of many teachers, all over the commonwealth, is indicated by their apparel. Quakers or Friends, Amish, Dunkards, and other sects, wear garments which at once disclose their membership in a religious sect. Ministers or preachers of many Protestant denominations wear a distinctively clerical garb. No one has yet thought of excluding them as teachers from the schoolroom on the ground that the peculiarity of their dress would teach to pupils the distinctive doctrines of the sect to which they belonged. The dress is but the announcement of a fact, that the wearers hold a particular religious belief. The religious belief of teachers and all others is generally well known to the neighborhood and to pupils, even if not made noticeable in the dress, for that belief is not secret, but is publicly professed. Are the Courts to decide that the cut of a man's coat, or the color of a woman's gown, is sectarian teaching, because they indicate sectarian religious belief? If so, then they can be called upon to go further. The religion of the teacher being known, a pure unselfish life, exhibiting itself in tenderness to the young, and helpfulness for the suffering, necessarily tends to promote the religion of the man or woman who lives it. Insensibly, in both young and old, there is a disposition to reverence such an one.

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and, at least to some extent, consider the life as the fruit of the particular religion. Therefore, irreproachable conduct, to that degree, is sectarian teaching. But shall the education of the children of the commonwealth be entrusted only to those men and women who are destitute of any religious belief? * * * In the sixty years of existence of our present school system, this is the first time this Court has been asked to decide, as matter of law, that it is sectarian teaching for a devout woman to appear in a schoolroom in a dress peculiar to a religious organization of a Christian church. We decline to do so; the law does not say so."

Such a law appears to me to be contrary to the spirit of our institutions. The learned counsel for the defendants has well said that, as the statute stands, a teacher may cover himself with partisan political badges, or herself with the white ribbons of crusading Prohibitionists, or wear the red ribbon of personal liberty; he or she may dress as fop or flirt, or may masquerade as clown or coquette, may display badges of Free Masonry, Odd Fellowship or Knights of Pythias, or may "sport" the Elks' tooth or the Eagle's talons, in the class room, and this law will not touch them; but, if they wear the plain iron cross of the Episcopal Order of St. Andrew, the modest button of the Society of Philip and Andrew, or of the Epworth League, or of the Society of Christian Endeavor, they are disqualified as school teachers. If they don the plain skirt and the straight bonnet of the Mennonite, or wear the straight coat and shaven upper lip of the Dunkard or the buttonless garb of the Amish, they are to be banished into outer professional darkness, stripped of their office and their rights. The Legislature, carrying the

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point to its natural conclusion, should have also provided that our present efficient State Superintendent of Public Instruction, under penalty of losing his office, must abstain from wearing the white tie indicative of his ministerial profession, because, forsooth, it shows to the school children that he still adheres to his religious faith. Of course, if the power to pass such an enactment exists, its mere grotesqueness will not prevent its execution, for, in that case, the appeal would be to the Legislature, and not to the Courts; and it may be urged that the particular dress is not necessarily a part of the wearer's religion, and, for this reason, the rights of conscience are not involved therein. It will, however, be recalled that the indictment charges that the teacher is wearing a dress which indicates that she is "a member and adherent of a religious order, sect and denomination," and the demurrer confesses the allegations of the indictment to be true. The real question cannot, therefore, be evaded by such sophistry. It must be met upon the broad ground of the sufficiency of power in the Legislature to pass such a statute.

It is true that, in *Hysong v. School District*, *supra*, Judge Dean added that "the Legislature may, by statute, enact that all teachers shall wear in the school room a particular style of dress, and that none other shall be worn, and thereby secure the same uniformity of outward appearance as we now see in city police, railroad trainmen, and nurses of some of our large hospitals." These expressions were, of course, *obiter dicta*, and were not essential to the decision of the point at issue in the case. But, conceding them to be a correct exposition, that point is not here involved; for the Legislature did not see fit to make

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any universal rule. It adopted no general style of dress; but it did attempt to exclude certain persons, who, on account of their religious sentiments, saw fit to adopt a plain garb, from holding employment under the commonwealth.

The case of *O'Connor v. Hendrick*, as Trustee of School District, etc., 184 N.Y., 421, may be considered as in conflict with the views herein expressed. Whether or not this is so cannot with certainty be said, for it does not appear in the report of that case that there is any provision in the constitution of the State of New York similar to that which is contained in ours. What was decided is, that the Superintendent of Public Instruction, having authority to regulate the management of the schools, could prohibit teachers from wearing a distinctively religious garb while engaged in the work of teaching. But, even though this is the law of the State of New York, I do not think that it is, or should have any force or effect, in the State of Pennsylvania; for the conclusion seems to be based upon the dissenting opinion of Mr. Justice Williams, in the *Hysong* case, instead of upon the judgment of our Supreme Court.

I am of opinion that the Act of 1895 is contrary to Sections 3 and 4 of Article I of the bill of rights, and is, therefore, unconstitutional and void, and judgment is accordingly entered on the demurrer in favor of the defendants.

Judgment for defendants.

—From Lancaster Law Review.

Commonwealth v. McComb

It is within the power of the Legislature to regulate the manner of taking game, but in doing so, it must not discriminate in such way as to produce injustice to individuals.

A statute which prohibits the killing of game with automatic guns and permits it to be killed with all other kinds of guns is a discrimination against the makers of automatic guns, and deprives them of the equal protection of the laws.

The Act of May 31, 1907, P.L. 329, prohibiting the use of automatic guns for the killing of game or wild birds is unconstitutional. It offends against both the Constitution of the United States and the Constitution of Pennsylvania.

CONSTITUTIONAL LAW—GAME LAWS—AUTOMATIC GUNS—
ACT OF MAY 31, 1907—CONSTITUTION OF THE
UNITED STATES, 14TH AMENDMENT—CONSTITUTION
OF PENNSYLVANIA, ART. I, SECT. I, AND ART. III,
SECT. 7.

Q. S. of Delaware County.

Appeal from summary conviction.

William I. Schaffer, Esq., for Appellant.

Josiah Smith, Esq., Contra.

Opinion by Broomall, J.

OPINION.

The defendant was charged with killing a wild duck with an automatic gun, in violation of the provisions of the Act of May 31, 1907, P.L. 329, and was summarily convicted before an alderman of the City of Chester and sentenced to pay a fine of \$50 or to be imprisoned for fifty days. An appeal to the Quarter Sessions was allowed.

William I. Schaffer, for the appellant: The Act is unconstitutional; *Barbier v. Connolly*, 113 U.S. 27; *Con-*

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nolly v. Union Sewer Pipe Co., 184 U.S., 540; Lawton v. Steele, 152 U.S., 133; Holden v. Hardy, 169 U.S., 366; Matter of Jacobs, 98 N.Y., 98; Pumpelly v. Green Bay Co., 13 Wall, 166; Wynehamer v. People, 13 N.Y., 378; People v. Otis, 90 N.Y., 48; Richmond Safety Gate Co. v. Mayor of Philadelphia, 11 District Reps., 342; Com. v. Zacherias, 181 Pa., 126; State v. Gardner (Ohio), 41 L.R.A., 689; In re Marshall, 102 Fed. Repr., 323.

Josiah Smith, Contra.

April 25, 1908. The Court: The defendant was arrested, taken before Robert Smith, an alderman of the City of Chester, charged with violating the provisions of the following Act of Assembly of this Commonwealth.

He was, after hearing, convicted and sentenced to pay a fine of \$50 or suffer an imprisonment for fifty days.

The statute is as follows: "Section 1. Be it enacted, that from and after the passage of this Act, it shall be unlawful for any person to use what is commonly known as an automatic gun for the killing of game in this Commonwealth. Each and every person violating any provision of this Section shall be liable to a penalty of \$50 for each offence, or shall suffer an imprisonment in the common jail of the county for a period of one day for each dollar of penalty imposed.

"Section 2. Each and every magistrate, alderman and justice of the peace within this Commonwealth shall have the right of summary conviction in all matters pertaining to a violation of any of the provisions of this Act, and all prosecutions for violation of any of its provisions shall be conducted and the penalties disposed of in the manner and form as is now prescribed by law for violation of the game laws of this Commonwealth."

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He appealed (after leave of Court.)

His defence is. that the fine was illegally imposed, because this Act is in derogation of the 14th Amendment to the Constitution of the United States, which declares: "Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

He also contends that it is in violation of Section 1, Art. 1, of the Constitution of Pennsylvania, which is as follows: "All men . . . have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation and of pursuing their own purpose."

Also of Section 7, Art. 3, of said Constitution, which prohibits the General Assembly from passing any law "granting to any individual any special or exclusive privilege or immunity."

There is no doubt of the right of the Legislature to regulate the manner of taking game, but, in doing so, it must not discriminate in such a way as to produce injustice to individuals.

The statute prohibits the killing of game with automatic guns and permits it to be killed with all other kind of guns.

This is a discrimination against the makers of automatic guns and permits it to be killed with all other kinds the laws guaranteed by the Constitution of the United States and the Constitution of Pennsylvania.

The defendant is discharged.

—From Weekly Reporter, Chester, Pa.

Commonwealth of Pennsylvania
v. Charles W. Bacon

Under the Act of April 19, 1905, P. L. 217, regulating speed limit of automobiles, the record of a justice will not be sustained if there is nothing to connect the defendant with the car or the act.

The owner of an automobile will not be liable, if it is used without his knowledge, order or consent; otherwise he could be sent to jail for an act done without his knowledge, by persons for whose acts he would not be responsible.

Proceedings before justice are considered irregular where defendant is required to give bail for his appearance at Court.

REGULATING SPEED OF AUTOMOBILES—RECORD OF J.P.—
LIABILITY OF OWNER OF CAR—CONVICTION.

No. 159, October Term, 1908. C.P. of Montgomery Co.

Certiorari.

Edwin S. Nyce, Attorney for Defendant.

Opinion by H. K. Weand, J., November 12, 1908.

OPINION.

The record of the justice sets forth that an automobile, No. 15775, was driven on the public road in Lower Providence township, at a rate of speed exceeding that allowed by law; but there is nothing to connect the defendant with the car or the act. It is not set forth that he was the owner of the automobile or in it at the time.

If he did own it and it was used without his knowledge, order or consent, he would not be liable; otherwise he could be sent to jail for an act done without his knowledge by persons for whose acts he would not be responsible.

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To sustain this conviction we must hold without evidence, that he was the owner, and its occupant at the time alleged, or at least that it was being used for his purposes and by his consent.

A summons was issued and defendant appeared and made no defense. As there was no evidence connecting him with the violation of law he was not required to make defense.

The proceedings are otherwise irregular in that the justice after fining the defendant required him to give bail for his appearance at Court.

And now, November 12th, 1908, after argument and due consideration, the exceptions are sustained and proceedings set aside.

Commonwealth v. Mrs. Jerry Long

Defendant, a married woman, was arrested, indicted and convicted for assault and battery. A motion in arrest of judgment was filed and the Court sustained the same on the ground that the defendant was a married woman at the time of the alleged offense, it appearing by the information and testimony, that the assault and battery were committed in the immediate presence of her husband, and that she must be presumed to have committed the same by his direction and under his coercion.

ASSAULT AND BATTERY—MOTION IN ARREST OF JUDGMENT—HUSBAND AND WIFE—COVERTURE.

No .76, September Term, 1908, Q.S. of Somerset County.

Assault and Battery.

Motion for Arrest of Judgment.

John R. Scott and John S. Miller, District Attorney, for
Commonwealth.

Ruppel & Uhl, Attorneys for the Defendant.

Opinion by Francis J. Kooser, P.J., November 27, 1908.

OPINION.

The indictment was found on the following information: "On the 15th day of August, A.D. 1908, I went to Mrs. Jerry Long's house, in Black township, county and state aforesaid, to get my turkey that belonged to me, with a notice from the justice of the peace; handed the notice to Mr. Long, and he said he could not read. I then handed it to Mrs. Long, but she still refused me the turkey; the said Mrs. Long told her husband to hit me,

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and when he did not comply with her request, she, the said Mrs. Long, got the axe and hit me on the arm."

An indictment was found on the information so taken, and upon the trial of the case the defendant was convicted.

A motion for the arrest of judgment was filed because of manifest errors in the record. Same alleged as follows:

1. There is no proper information on file upon which the indictment can be founded, and, therefore, there should have been no conviction.

2. The defendant, Amelia Long, is the wife of Jeremiah Long, and it was proven on the trial by the evidence upon the part of the commonwealth that the offense complained of was committed in the presence of the husband of the defendant, and during a quarrel between said husband and the prosecutor, and because no judgment against her, the said Amelia Long, can be legally rendered on said record.

OPINION.

We could not arrest the judgment in this case upon the first ground assigned, to-wit: "There is no proper information on file upon which the indictment can be found."

If it even be true that no proper information is on file, objection should have been taken to this, and perhaps was so taken, before issue joined and the jury was sworn.

Upon the second ground assigned, we think the judgment must be arrested.

As appears by the information and the indictment, the defendant was a married woman at the time of the alleged offense, it also appears by the information and the

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testimony that the assault and battery were committed in the immediate presence of her husband. This being so, it must be presumed to have been committed by his direction and under coercion from him.

This we think must exonerate her. See Commonwealth v. Jane Lindsey, 2 Foster, 216; and for a full discussion of the question, Am. & Eng. Encyc. of Law, Vol. 15, page 901.

And now, 27th Nov., 1908, judgment arrested as prayed for.

Reported by H. F. Yost, Somerset, Pa.

Commonwealth of Pennsylvania v. Guy Fluck

A., by a parol agreement, gave to B. the right to use the surface of a parcel of land for cultivation, so long as B. held and paid the taxes thereon. There was a coal mine opening on the ground and A., uniting with others, leased the coal in and under this parcel of land to C., the agreement containing "The party of the first part is to have the use of the surface of the two and three-fourth acre parcel, subject to the right of the second party to operate his plant, and is not in any way to interfere with the cultivation of the land." B. objected to defendant's traveling the path over the property, although A. orally gave him permission so to do.

Held not necessary to determine if B., under his peculiar tenancy and not an owner of the land, can enforce the provisions of the Act of April 14, 1905, P. L. 169, because under the lease to C. the trespass cannot be considered willful.

TRESPASS—ACT OF APRIL 14, 1905, P.L. 169—LEASE—
MINING RIGHTS.

No. 73, September Sessions, 1908, Q.S. of Somerset Co.

Appeal from Summary Conviction.

Alex. King and C. W. Walker, Attorneys for Appellant.

A. C. Holbert and John S. Miller, District Attorney,
with him.

Opinion by Kooser, P.J., November 24, 1908.

OPINION.

This is an appeal upon allowance by the Court, from a judgment of a justice of the peace, from summary conviction, under the Act of 14th April, 1905, P.L. 169.

The information is made by George Auman, Sr. The trespass alleged is, that the defendant traveled upon a footpath leading for a distance of several hundred feet to

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the mouth of a coal mine, where the defendant was employed. The facts are as follows:

1. The land upon which the trespass is alleged to have been committed is a parcel of about two and three-fourths acres, held by George Auman, Jr., under a lease providing for a term of ninety-nine years.

2. By parcel agreement, George Auman, Jr., has given to the prosecutor, George Auman, Sr., the right to use the surface of this parcel of land for cultivation, so long as George Auman, Sr., wants to hold it, and pays the taxes thereon.

3. There is, and for a long time has been, a coal mine opening on this parcel, and on the 29th day of February, 1908, George Auman, Jr., (uniting with others as to other lands), leased the coal in and under this parcel of land to one M. H. Weaver, the agreement containing this clause: "The party of the first part is to have the use of the surface of the two and three-fourth acre parcel, subject to the right of the second party to operate his plant, and is not in any way to interfere with the cultivation of the land." At and for a considerable time before the lease to Weaver, a public road led by the mine, furnishing access to it from the east and west, and a path was opened, well defined, and used by the employees coming to the mine from the north.

4. George Auman, Sr., went into possession of the surface under his agreement with George Auman, Jr.; paid the taxes regularly, was in possession at the time of the alleged trespass, and himself posted notices upon the premises; but how many notices he posted, or what the contents of the notices were, or where he posted them

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was not made to appear to the Court. The defendant, an employee of the mine, traversed the parcel by the path aforesaid, but did not travel outside of this long defined path, nor interfere with the cultivation of the land. George Auman, Sr., objected to the defendant's traveling the path, though George Auman, Jr., orally, gave him permission to so travel it.

It is not necessary that we determine if George Auman, Sr., under his peculiar tenancy and not an owner of the land, can enforce the provisions of this penal statute, because it is clear, aside from this, that under the lease to Weaver, with a path to the mine then upon the ground and in use by the employees thereat, and with the express permission of George Auman, Jr., this trespass cannot be considered wilful; and even if it were, the insufficient proof of this notice would be an end of the case.

And now, 24th November, 1908, upon hearing, judgment entered in favor of the defendant, Guy Fluck, and against the prosecutor, George Auman, Sr., for costs.

Reported by H. F. Yost, Somerset, Pa.

Commonwealth v. Jacob D. Rider

A writ to bring up a magistrate's record of a summary conviction of a penal offense is irregular if issued without a previous allocatur, and it may be quashed for that reason.

The Act of March 20, 1810, and its supplementary Act of April 26, 1855, P. L. 304, authorizing a Writ of Certiorari to issue to a Justice without a special allowance by the Court of Common Pleas applies only to civil actions.

Where the record of the Magistrate returned shows that the proceedings had before him were so irregular that a certiorari would have been allowed if applied for, the Court may in its discretion decline to quash the Writ and may treat it as allowed *nunc pro tunc*. If quashed, the defendant could at once apply for and be allowed a new writ.

SPECIAL ALLOCATUR—IRREGULARITY OF PROCEEDINGS—
GROUND FOR ALLOWANCE OF SPECIAL ALLOCATUR
NUNC PRO TUNC.

No. 153, August Term, 1908, C.P. of York County.

Motion to quash Certiorari.

William M. Ammon, Attorney for Commonwealth.

Cochran & Williams, Attorneys for Defendant.

Opinion by Wanner, A.L.J., November 16, 1908.

OPINION.

It is well settled that a writ of certiorari to bring up a magistrate's record of a summary conviction of a penal offense is irregular if issued without a previous special allocatur, and may be quashed for that reason.—Commonwealth v. Antone, 22 Pa. Sup. Ct., 412; Commonwealth v. Wissler, 24 Lanc. L.R., 69; Commonwealth v. Hostetter, 25 Lanc. L.R., 55.

Commonwealth v. Jacob D. Rider.

The Act of March 20, 1810, and its supplementary Act of April 26th, 1855, P.L. 304, authorizing a writ of certiorari to issue to a justice of the peace without a special allowance by the Court of Common Pleas, applies only to civil actions.—*Commonwealth v. Antone*, (supra.)

But when the record returned shows that the proceedings had before the magistrate were so irregular, that a certiorari would have been allowed, if applied for, the Court may, in its discretion, decline to quash the writ, and may treat it as allowed, *nunc pro tunc*, because, if quashed, the defendant could at once apply for and be allowed a new writ. In that way, additional litigation may be avoided.—*Commonwealth v. Mitchell*, 17 York L.R., 172; *Thirty-fourth St., Phila.*, 81 Pa., 27; *Caughey v. Mayor of Pittsburg*, 12 S.&R., 53; *Holland v. White*, 120 Pa., 228; *Moock v. Conrad*, 155 Pa., 596.

We will, therefore, allow the defendant his writ of certiorari, *nunc pro tunc*, as of the day of its issue, with leave to take testimony in support of certain of his exceptions before ruling upon the sufficiency of the magistrate's record as returned in this case.

And now, to-wit: November 16th, 1908, the motion to quash the writ of certiorari is overruled.

Reported by J. Edgar Small, York, Pa.

E. M. Biddle v. the County of Cumberland

Held, That to allow the auditors, after filing their report, to employ the services of counsel, at the expense of the County, to defend the judgment which they had rendered, would be like a board of arbitrators employing, at the expense of an appellee, counsel to sustain the award which they had rendered. On filing their report, the jurisdiction of the auditors over their findings ceased, and if they desired to sustain their judgment, they must do it in the way pointed out by the Act of Assembly, at their own expense and not at the expense of the County.

Plaintiff sued in assumpsit to recover for professional services rendered under an employment by the County Auditors, acting in their official capacity in their work of auditing, settling and adjusting the accounts of the commissioners, coroner, sheriff, treasurer and overseers of the poor, which claim the county commissioners refused to approve or order to be paid.

COUNTY AUDITORS—EMPLOYMENT OF COUNSEL.

No. 15, November Term, 1907, C.P. of Perry County.

In Re Motion for Judgment Non Obstante Veredicto.

James M. McKee, Frank B. Sellers, Jr., E. M. Biddle, Jr.,
Attorneys for Plaintiff.

M. F. Thompson, Barnett & Son, Attorneys for Defendant.

Opinion by Shull, P.J., October 20, 1908.

OPINION.

Plaintiff sued in assumpsit to recover \$125.00 for professional services rendered under an employment by the County Auditors, acting in their official capacity in their work of auditing, settling and adjusting the accounts of the Commissioners, Coroner, Sheriff, Treasurer and Overseers of the Poor of Cumberland County, which sum

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the County Commissioners refused to approve or order payment by the Treasurer. A change of venue was granted and a trial had in this county, which resulted in a verdict for the plaintiff for services rendered by plaintiff to 25th February, 1907, the date of filing the report by the Auditors, in the sum of \$59.00, and subsequent thereto in the sum of \$29.00, making a total of \$88.00.

The matter now raised is upon two reserved points submitted at the trial by counsel for defendant, as follows:

1. "The Auditors of Cumberland county were without power or authority, in retaining counsel and availing themselves of his advice and professional assistance in the performance of their duties as such Auditors, to make the county of Cumberland liable to pay for services so rendered."

2. "Upon filing of their report, on the 25th day of February, 1907, the official powers and duties of the County Auditors terminated and they were without power or authority, thereafter, to obligate the county for services of counsel retained by them to defend their report upon exceptions taken by the County Commissioners or for any other purpose."

In our examination of the question raised on the first point, as to the right of the County Auditors to employ counsel to advise them in the performance of the duties enjoined upon them by the statutes, it is necessary that we bear in mind, as argued by counsel for defendant, that where the compensation of public officers is fixed by statute, the officer cannot recover additional compensation for expenses incurred by him incident to the performance of his official duties. (Albright v. County of

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Bedford, 106 Pa. 582; McKean County v. Young, 11 Super. Ct., 488.) On examination of these authorities it will be discovered that the question in the former was as to whether the Commissioners were limited to the per diem compensation fixed by the statute, and the latter citation was upon an allowance claimed by the Commissioners on a junketing expedition to a convention. In neither of which cases is the point raised that is now before us. Under the evidence adduced, the jury has found that the plaintiff was actually employed by the County Auditors to counsel and advise them, and that under the evidence his services to 25th February, 1907, were worth \$59.00. Was this finding legal? It may be conceded that County Auditors elected from the common body of the people would not be possessed of that technical knowledge which would aid them in the determination of legal questions which frequently arise in the performance of their several and respective duties. The County Solicitor is neither required to advise or counsel the County Auditors under the duties enjoined in such employment, nor would he be a proper person in many instances to thus advise them. His duty is with the Commissioners, who fix his compensation, whose interests he is in duty bound to subserve. And it appears, from the many cases upon the books, that the interest of the tax payer, whom, in a general way, it is the duty of the Auditors to protect, is often antagonistic to that of the Commissioners. "No man can serve two masters," whose rights are adverse; hence the impropriety of a counsel for the Commissioners advising the County Auditors. Consequently, there is presented the proposition that Auditors, from necessity, under certain circumstances, where difficulty presents itself, need

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the assistance of counsel, and for the welfare of the taxpayers should have the services of one learned in the law to counsel them. This necessity creates the right to employ such assistance, and inasmuch as "the laborer is worthy of his hire," creates, also, an implied liability on the part of the county to make reasonable compensation for services so rendered.

The very able opinion of Judge Terry, in Wyoming County Auditors, reported in 14 D.R., 539, as to allowance for such services, where the same is approved by the County Commissioners, and by Judge Wanner, in Niles & Neff v. York County, 15 D.R., 717, where the bill is not approved, but the services actually rendered, together with the authorities by them cited, renders it unnecessary for us to further amplify this branch of the case. We accord with the views therein presented.

Coming, then, to the second point reserved, a different feature is presented. When the report of the Auditors was filed, their duties terminated. The report passed to a Court of Record, and becomes a judgment. (Com. v. Al-lis, 19 Sup. Ct., 130.) It must then be treated as a judgment of the Court. The Act of June 12, 1878, P.L. 208, provides for the protection of all parties. Due and timely notice is required to be given and an opportunity of examination is afforded. When ten or more taxpayers may within ninety days upon entering recognizance, conditioned that the appellants shall prosecute said appeal with effect, and to pay all the costs that may accrue thereon, in case they fail to obtain a final decision more favorable to the county than the report from which the appeal is taken, may appeal; and, providing further, that the Court shall

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direct the issue, etc. Thus would the interests of all parties be carefully safeguarded.

To allow the Auditors, after filing their report, to employ the services of counsel at the expense of the county to defend the judgment which they had rendered, would be like a board of arbitrators, employing, at the expense of an appellee, counsel to sustain the award which they had rendered. On the filing of the report on the 25th February, 1907, the jurisdiction of the Auditors over their findings had ceased, and if they desired to sustain their judgment they must do it in the way pointed out by the Act of Assembly, at their own expense, and not at the expense of the county. To permit it to be done otherwise might become more oppressive and burdensome to the county than the acts of omission by the Commissioners in the first instance. The same limitations and restrictions should be placed upon the Auditors that would be visited upon the County Commissioners, and if they exceed this, they must pay for it. We are, therefore, clearly of the opinion that the second point should have been affirmed.

And now, 20th October, 1908, it is ordered, adjudged and decreed that the motion N.O.V. be sustained insofar as it relates to the sum of \$29.00, and judgment as of the date of the verdict be entered against the county for the sum of \$59.00 and costs.

Reported by Walter W. Rice, New Bloomfield, Pa.

Charles E. Hoy v. Annie Derr,
Jeremiah Derr

1. A writ of certiorari can not be quashed because no recognizance has been filed—as a recognizance only operates as a superse-deas.

2. When the transcript from a Justice of the Peace, has been filed in the Court of Common Pleas, by virtue of a writ of certiorari it is then beyond the power of the Justice of the Peace to amend the same and the Common Pleas can not.

There is a distinction between correcting an error in a transcript which does not conform or agree with the record itself, and changing a record once made to conform with a transcript already filed in the Common Pleas.

Question: When the Justice of the Peace sends two transcripts into the Common Pleas in obedience to a writ of certiorari, each one different, and he certifies to the correctness of both—how is it to be determined which is correct?

3. Where, on a joint contract, both parties are sued jointly, yet the process is served only upon one of them and judgment is rendered against both of them jointly, we are strongly inclined to the opinion that judgment could not be reversed as to one and affirmed as to the other. One of the defendants was not served with the summons, and therefore judgment could not be entered against him. This principle is so well established that it does not need the citation of any authority to support it. It is therefore sustained.

4. When a Justice of the Peace reserves his decision he must state in his docket the day and hour when he will render his decision or judgment will be reversed for that reason.

JOINT SUIT IN ASSUMPSIT—MOTION TO QUASH WRIT OF
CERTIORARI—APPLICATION BY JUSTICE TO AMEND
TRANSCRIPT ALREADY FILED—JUSTICE TO NAME DAY
AND HOUR WHEN HE WILL DECIDE THE CASE, ONCE HE
RESERVES HIS DECISION.

No. 99, February Term, 1908, C.P. Northumberland Co.

Certiorari.

William H. Hackenberg, Esq., for Plaintiff.

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Arthur L. Swartz, Esq., for Defendants for Certiorari.

Opinion by Vorris Auten, A.L.J., November 14th, 1908.

OPINION.

Two preliminary questions are presented: (a), a motion to quash the writ, and, (b), an application by the Justice of the Peace to amend the transcript.

The motion to quash the writ is based upon the fact that the defendants failed to file a recognizance. The only effect, however, of such failure is that the certiorari did not operate as a supersedeas; it does not render the writ void. In support of this doctrine there is abundant authority: *Roher v. Musselman*, 6 *Lanc. Bar*, 501; *Shertzer v. Gonder & Son*, 7 *Luzerne Leg. Reg.*, 192; *Thomas v. Glasgow*, 2 *D.R.*, 711; *Leibner v. Rupert*, 10 *Kulp*, 24; *Mackintosh v. Rishell*, 16 *D.R.*, 651.

It is true that Judge Livingstone, in *Dorsey v. Wasson*, 18 *Lanc. Law Rev.*, 375, in quashing the writ of certiorari on proper grounds, added: "And for the further reason that no recognizance was filed by defendant in above-stated certiorari, as is required by the Act of the General Assembly before such writ should be issued." But Judge Landis, now president of that Court, speaking of Judge Livingstone's opinion, says, in *Mackintosh v. Rishell*, *supra*: "But this point appears to have been taken from the exceptions filed in the case; it does not seem to have been seriously considered, and was not essential to the decision arrived at."

The motion to quash the writ is over-ruled.

The summons in this case was issued December 7, 1907, returnable December 13, 1907. The certiorari issued December 17, 1907, and the exceptions were filed

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February 3, 1908. On the day of the argument on the exceptions, the Justice of the Peace before whom the case was tried was permitted to file an application for leave to amend the transcript returned to the Court, so as to make it conform to his docket as the same was by him amended subsequently to the entry of the judgment and the return to this Court of the transcript of his record of the case.

The service of the summons, as was shown by the return of the constable, was as follows: "Served by handing a true and attested copy to the defendant, Annie Derr, Dec. 7, 1907." The material parts of the Justice's transcript are as follows:

"Served on defendant by handing a true copy to Deft., Annie Derr, and leaving the same with her at their dwelling house; done Dec. 7th, 1907. So answers L. H. Pfleegor, Const.

"Annie Derr, being the wife of Jeremiah Derr, Plff., demands on book account the sum of \$177.00 for goods, (groceries, etc.,) sold by Plff., and delivered to the Defts. for the use of the Defts. Subpoena issued for Plff. for Mrs. Thomas Shutt, on Dec. 7th, 1907. Now, Dec. 13th, 1907, at 10 o'clock a.m., Plff. appears with W. H. Hackenberg, his attorney. A. L. Swartz, Esq., appears for Annie Derr.

"Jeremiah Derr appears in person as a witness for Deft., and not in answer to the summons. C. E. Hoy, Plff., sworn. Rose Shutt, sworn for Plff. Jeremiah Derr, sworn for Deft. After hearing the proofs and allegations of both Plff. and Deft., judgment reserved; render judgment publicly in favor of the Plff. and against the Defts. for the amount of \$174.55 and costs of suit."

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In his application to amend, the Justice certified that on August 8, 1908, he amended his record so as to make it, *inter alia*, show that Jeremiah Derr appeared in person as a witness for Defts., and not in answer to the summons; that Jeremiah Derr, Deft., was sworn; that after the hearing, it then being the noon hour, judgment was deferred until the afternoon of the same day; that in the afternoon of the same day, December 13, 1907, judgment was publicly given in favor of Plffs. and against the Defts. for \$174.55, with costs of suit; that in the afternoon of the same day, A. L. Swartz, Esq., attorney for Annie Derr, appeared before the Justice, at his office, and was notified of the entry of judgment against the Defts., and was handed the docket entry of said judgment, and that the attorney then and there read the same.

The Justice further certifies that he has further amended the record of the case, as follows: "And now, to-wit, August 8, 1908, record further amended so as to read as follows—Jeremiah Derr, one of the Defts., not having been served with the summons in said case, the judgment entered therein is altered and amended so as to read: Judgment in favor of Plaintiff, and against Annie Derr, only, she being the only Defendant served, for the sum of one hundred and seventy-four and fifty-five one-hundredth dollars and costs of suit."

The Justice further certifies that the omission to note on his docket in the first instance, that judgment was deferred until afternoon of the same day, and that the Deft., Annie Derr, through her attorney, was warned and notified of the entry of the judgment, "was inadvertently made and was a mistake, and that the amendment

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aforesaid is in accordance with the facts and the true and actual proceedings had before me in said case." Should the amendment be allowed? In *Justice v. Meeker*, 30 Sup. Ct., 207, where it was averred that the transcript on file was not a true and correct transcript of the judgment, as it appeared upon the docket of the Justice, and where and what was alleged to be a true and correct transcript of the proceedings, was presented to the Court with a prayer that the record of the Common Pleas be amended to conform to the transcript presented, the Court below granted a rule on the Justice to show cause why the transcript should not be amended, which rule was subsequently made absolute. The Superior Court say: "The order of the Court permitting the amendment of the transcript was right; this was not an amendment of the proceedings before the Justice, but the correction of mistakes in the transcript so as to make it correctly show what proceedings were had before the Justice. When there are mistakes in a transcript, they may be, and ought to be, corrected. The judgment is founded upon the record of the Justice, and the transcript should be made to truly present that record: whether it does so is to be determined by the Court below, upon inspection of the docket, and all the papers and evidence before them." There is nothing in that case which authorizes an amendment of his docket by a Justice of the Peace after the same has been removed to the Common Pleas by certiorari; nor is there any intimation that such was attempted. All that was there done was an allowance of an amendment of a transcript so as to make it conform to what appeared on the docket. There is nothing to indicate that the docket itself had been altered or amend-

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ed in any particular. In the later case of McCloskey v. O'Hanlan, 35 Sup. Ct., 95, it was held that where an appeal has been taken from a Justice of the Peace and a transcript of the judgment filed, a petition asking leave to amend by filing a transcript annexed to the petition will not be granted where there is nothing on record to show that there was any fraud practiced, nor anything to show that the transcript was incorrect.

The Court say: "It is somewhat significant that there was no allegation in the petition of any fraud on the part of the defendant in securing the transcript which he filed, nor that the same was not signed by the magistrate, nor is it alleged that it was not a true transcript of the record as it existed at the time it was certified." It is there further said that: "The inherent power of the Court to make verbal changes or correct errors in dates or other matters of that nature seems to have been recognized very early. In *Caldwell v. Thompson*, 1 Rawle, 370, it is stated that on application to the Court of Common Pleas, where it is alleged that the transcript returned does not conform to the Justice's docket which is alleged to be erroneous, and an application is made for leave to amend the docket by the transcript, the Court below is to determine upon the inspection of the docket, and all the papers and evidence before them, what are the true words of the record."

The language of the Superior Court, relating to *Caldwell v. Thompson*, was evidently taken from the syllabus of that case, but a careful reading of that case, however, shows that the application was not for leave to amend the docket by the transcript, but to amend the transcript so as to make it conform to the docket of the Justice. In

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that case it was also alleged that the docket entry itself had been altered, and the Supreme Court held that it was the duty of the Court below "to decide what were the true words of the record." There is nothing in the report of that case to indicate that the Supreme Court would have allowed an amendment of the record of the Justice.

In *McCloskey v. O'Hanlan*, the Superior Court strongly intimates that where there is no allegation of fraud on the part of the defendant in securing the transcript, or that it was not a true transcript of the record as it existed at the time it was certified, the amendment sought will not be allowed.

The Court there further says; "How was it to be determined whether the transcript on file or the one attached to the petition of the magistrate and the alleged plaintiffs in the suit, was correct? Evidently by a comparison with the record itself."

With what record? Certainly with the record as it existed at the time the transcript was given, not as it was subsequently amended by the Justice. We think the opinion of Judge Stewart on this point, in *Stambaugh v. Baker*, 10 D.R., 79, is clear and convincing. He there says: "There is no question but what a justice can amend his record so as to make it conform to the truth while it remains within his control: *Kearney v. Pennock*, 12 Pa. C.C. Reps., 37. And in all cases of error the parties must apply to the Justice for relief or correction of his record: *Clark v. M'Comman*, 7 W.&S., 469. But where is the authority of a Court of Common Pleas to direct or allow the record of a Justice to be amended while it remains before

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him, and where is the authority of a Justice to amend it after it has been removed by a certiorari?

None has been cited. Manifestly none exists. While a Justice's Court is not strictly a court of record, yet the Justice is the Judge of a Court which derives its jurisdiction from statutory grants, proceeds in most things according to the substance contained in the forms of the common law, and his docket as to things adjudicated by him has the conclusiveness of a record: *Coffman v. Hampton*, 2 W.&S., 377. Parol evidence is admissible to contradict it; *Clark v. McComman*, 7 W.&S., 469. It is true that when his record comes into Court on appeal, the proceedings are de novo, and may generally be amended or changed, but not under all circumstances.

When a Justice's docket should have shown, but did not, that the action was brought under a special Act of Assembly, which would have entitled the plaintiff to a recognizance on appeal in a particular form, the Court below quashed the appeals upon the affidavit of the plaintiff, showing what the Justice's docket should have contained, and the Supreme Court reversed the decision and reinstated the appeals, saying: "It was not thus that the Justice's transcript could be supplemented, when the effect would be to deprive the defendant of a trial by jury." *D. & H. Canal Co. v. Loftus*, 71 Pa., 418.

Besides, what is the Justice's petition to amend more than an offer to prove by parol that the record which he made and is now no longer before him is incorrect? This identical proposition was denied in the opinion of the Supreme Court in *Coffman v. Hampton*, supra.

"The Court of Common Pleas has no right to intermeddle with the record of a Justice while it remains be-

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fore him, by amendment or otherwise, except to remove it by certiorari, or where a diminution is alleged to require him to complete it, and a Justice has no right to amend it after it is removed by certiorari. And, notwithstanding some cases have been decided which seem to indicate a contrary doctrine, they are not well considered and are not binding upon this Court.

"The suit here is against a constable for selling grain on an execution. Evidently, the title is in dispute, and to allow the amendment would be to deprive the defendant of his right to trial by jury, as was said in *Canal Co v. Loftus*, *supra*.

"But independently of this, I deny the right to amend after the case is removed into the open Court on certiorari. The Justice has already certified to the verity of the record, and he cannot now be allowed to contradict it."

In view of the foregoing authorities, the application to amend the transcript is disallowed.

We come now to the exceptions filed by the defendant, and these must be passed upon and determined with reference to the record as shown by the transcript returned by the Justice in obedience to the command of the certiorari.

The first exception is to the effect that Jeremiah Derr, one of the defendants, was not served with the summons, and, therefore, judgment could not be entered against him. This principle is so well established that it does not need the citation of any authority to support it.

It is, therefore, sustained. The second exception is as follows: "This action is a joint action against the defendants and being illegal as to Jeremiah Derr, must likewise be reversed as to Annie Derr, the other defendant."

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In *Jamieson v. Pomeroy*, 9 Pa., St., 230, it was held that where a judgment was entered generally and one of the parties was not served, the Court will reverse as to him, and affirm as to the others, under the Act of 1836.

In that case the two served appeared and made defense and had a trial. In *Murdy v. McCutcheon, et ux.*, 95 Pa., St., 435, a summons issued against two persons and was served on one only.

The claim was a joint contract and the declaration thereon was joint. Without an appearance by either defendant judgment was entered against both defendants.

Held, that this was error and the judgment should be set aside.

Mr. Justice Mercur, speaking for the Court, says: "It is true it was held in *Jamieson v. Pomeroy*, 9 Barr, 230, that the judgment might be affirmed against the defendants, served and reversed as to the one not served. There the two served appeared, made defence and had a trial, but judgment was entered generally against all of the defendants. This is not the case. Here there was no appearance by either defendant. No hearing of either, no trial.

Judgment was entered against both of the defendants, as the record declares, by default. It is conceded that the judgment is bad against the one not served. The claim was on a joint contract. The declaration was joint. The judgment is joint. It is incapable of separation: *Boaz et al., v. Heister*, 6 S.&R., 18; *Donnelly v. Graham*, 27 P. F. Smith, 274." In *Donnelly v. Graham*, *supra*, a summons was issued against four; three were summoned and the declaration was against them; one of these did

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not appear nor plead; two pleaded. The verdict and judgment was against the three. Held, that the judgment was bad and could not be sustained as to any. While we have not been able to find any case directly over-ruling *Jamieson v. Pomeroy*, and while it seems to be recognized by Mr. Justice Mercur, in *Murdy v. McCutcheon*, and is there distinguished, it appears clearly at variance with *Donnelly v. Graham*. When the contract is joint and the judgment joint, how can there be a separation, whether the judgment be taken by default or upon a verdict after a trial on the merits.

Twenty years after the opinion in *Jamieson v. Pomeroy*, Judge Woodward, in *Wagenhorst v. Smith, et al.*, 1 Woodward's, Dec. 421, where a summons had been issued against four, two of whom were not legally served and did not appear at the hearing before the Justice, says: "Upon Samuel Smith and Adams, who appeared, the writ was 'served personally.' Upon the two defendants who did not appear, it was served by copy. As to the latter, the service was a nullity. It could have been made effective only by appearance. The appearance of two of the defendants did not cure the defect as to the other two. The judgment was joint against the four, and was therefore erroneous." In *Heineman v. Miller, et ux.*, 10 Kulp, 411, Judge Wheaton says: "Where two are sued in a joint action, and only one is served with the process, the one not served failing to appear, there is no authority for entering a judgment against both. And where, upon a joint action, judgment is rendered against two, which is erroneous as to one, it cannot be reversed, as to one and affirmed as to the other."

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Among the authorities cited by Judge Wheaton, in support of his conclusions, are *Donnelly v. Graham & Murdy v. McCutcheon*, *supra*.

While we are strongly inclined to the opinion that in the present case the judgment could not be reversed as to Jeremiah Derr and affirmed as to Annie Derr, it is not necessary to decide this case upon that particular ground, as, in our view, the fifth exception is fatal to the plaintiff. It is as follows: "The judgment is erroneous and should be reversed for the reason that the Justice reserved his decision and the record is silent as to the time when this decision was to be rendered, as the justice must name the day and hour when judgment will be entered when the same is reserved." The transcript is as follows: "After hearing the proofs and allegations of both Plff. and Deft., judgment reserved. Render judgment publicly in favor of Plff. and against the Defts., for for the sum of \$174.55."

In *Fessler v. Sharp*, 7 D.R., 652, Judge Biddle held that where a Justice withheld his decision to a future date and failed to notify the parties when the judgment was entered, the judgment was fundamentally bad. In *Leslie v. Innes*, 3 D.R., 689, it was held that where a case is adjourned without a day, the Justice of the Peace cannot enter judgment without notice to the parties. In that case Judge Bell reviews a number of Common Pleas decisions in support of his views, viz: *Brown v. Hambright*, 21 Pitts. L.J., (O.S.) 105; *VanHorn, v. I.O.C.T.*, Number 76, 1 Kulp, 376; *Bower v. Stum*, 1 Lanc. L.R., 19; *Edwards v. Carr*, 3 Kulp, 192.

In view of these authorities, we feel bound to reverse the decision of the Justice.

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And now, November 14th, 1908, the judgment of the Justice is reversed and judgment is directed to be entered for defendants with costs.

Reported by J. P. Carpenter, Sunbury, Pa.

Thompson v. McDowell

Where a rule of Court requires a writ of certiorari to be made returnable "within twenty days from the issuing thereof," such a writ issued on March 21, 1907 and made returnable "to next term," which was on April 19, 1907, more than twenty days after the issuing of the writ; and no answer is made to a rule to show cause why the writ should not be quashed, or cause shown why the writ should not be quashed, the rule will be made absolute, and the writ quashed.

JUSTICE OF THE PEACE—CERTIORARI—RETURN OF WRIT
OF—QUASHING OF WRIT—PRACTICE.

No. 73, April Term, 1907, C. P. Mercer County.

The facts are stated in the opinion of the Court.

James D. Emery, for Plaintiff, the Defendant in Error,
cited Parks v. Watts, 112 Pa., 4; Williamson v. McCormick, 126 Pa., 274; Teter v. Cook, 2 Pa. C. C. Rep. 171.

T. C. Cochran for Defendant, the Plaintiff in Error.

Opinion by Williams, P. J., Nov. 16, 1908.

OPINION

On March 21, 1907, counsel for defendant filed in the office of the prothonotary a praecipe, affidavit and recognizance for a writ of certiorari to R. W. Mitchell-tree, a justice of the peace in Shenango township in said county. In pursuance of the praecipe so filed a writ of certiorari was issued to said justice, "returnable to next term." On April 22, 1907, counsel for the plaintiff, M. C. Thompson, filed a motion to quash said writ for

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the reason that it was not made returnable within twenty days, as required by rule of Court No. 74, but was issued on March 21, 1907, returnable to next term.

On this motion the Court granted a rule to show cause, returnable to the first Monday of June, 1907. To this rule no answer has been filed by the defendant, but the case has been twice placed on the argument list by counsel for the plaintiff. On April 6, 1908, when the case was last on the argument list, counsel for the plaintiff filed a motion as follows:

"And now, April 6, 1908, I move the Court for leave to add to the motion to quash heretofore filed, the following additional reasons:

"2. That the record does not show that the plaintiff in error has ever caused the writ to be executed or served upon the justice.

"3. That the record does not show that the plaintiff in error has ever caused the proceedings before the justice to be returned to the next term, or at any other time, according to law.

"4. That the plaintiff in error has failed to file any exceptions to the judgment of the justice, as required by law.

"5. That nothing appears on the record to authorize the Court to set aside the judgment of the justice.

"And for the above reasons the defendant in error moves for a judgment of non pros."

Rule 74 of our Rules of Court provides that:

"Writs if certiorari shall be made returnable within twenty days from the issuing thereof and shall be served

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upon the magistrate at least five days before the return day. If the magistrate fails to make return of the writ as aforesaid, either party may enter a rule upon him to return the same within five days after notice upon non-compliance with which an attachment will issue."

The writ of certiorari having been issued on March 21, 1907, returnable to next term, which was the third Monday of April, 1907, or April 19, 1907, more than twenty days after the issue thereof, and no answer to the rule to show cause having been filed, or cause shown why said writ should not be quashed, the rule must be made absolute.

This makes a consideration of the other reasons set forth in the plaintiff's motion unnecessary.

ORDER

And now, November 16, 1908, this matter came on to be heard and was submitted by counsel on the papers appearing of record, whereupon, after due consideration, the rule to show cause is made absolute and writ quashed.

Reported by James D. Emery, Mercer, Pa.

Commonwealth v. William G. Leas

In a proceeding by Summary Conviction before an Alderman for driving an automobile at an excessive rate of speed, under the Act of April 19, 1905, P. L. 220, the record of the Justice must show that the suit is brought in the name of or for the use of the Treasurer of the Township in which the offense was committed.

The Magistrate's record must identify the particular Act of Assembly or the provisions thereof, for the violation of which the defendant was convicted.

The information or the subsequent proceedings of record should refer to or show what act, by title, date of approval, page of the Pamphlet Laws, containing it, or otherwise, has been violated in order to show the jurisdiction of the Magistrate. The omission of these formalities leaves the record too incomplete and is fatal to the proceedings.

The record should show a hearing, conviction and imposition of fine upon defendant at the office of the Alderman, where the process was returnable, and where the case should have been tried; otherwise a judgment cannot be sustained.

The record should set forth in detail or with substantial accuracy, the testimony of the several witnesses for the Commonwealth, to enable the Court to determine whether or not all the essential ingredients of the statutory offense charged were duly proven at the hearing. The record should show by the testimony upon what particular public highway or at what point thereon the alleged offense was committed.

The Act of April 19, 1905, P. L. 220, was not intended to exempt from tagging, etc., such machines as manufacturers or vendors held in stock for sale only, and not for hire or private use, nor does it exempt such manufacturers or vendors from the penalty for violating the speed limits of said Act.

The fact that the record does not show that defendant drove his automobile for a full mile at the alleged excessive rate of speed is immaterial. It is the rate of speed only that is prohibited. No distance over which the vehicle must be driven to constitute the offense is specified in the Act.

ACT APRIL 19, 1905, P.L. 220—PARTIES TO SUIT—RECITAL
OF ACT OF ASSEMBLY VIOLATED—OFFICE OF MAGIS-
TRATE—TESTIMONY BEFORE ALDERMAN TO BE RE-
TURNED WITH RECORD—PARTICULAR PUBLIC HIGH-
WAY WHERE OFFENSE WAS COMMITTED—MANUFAC-
TURERS OR VENDORS OF AUTOMOBILES—MILE LIMIT,
EXCESSIVE RATE OF SPEED.

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No. 132, August Term, 1908, C. P. of York County.

Motion to quash certiorari.

William M. Ammon, Attorney for Commonwealth.

Cochran & Williams, Attorneys for Defendant.

Opinion by Wanner, A. L. J. November 16, 1908.

OPINION

This was a summary conviction of the defendant, before an alderman, for driving an automobile at a rate of speed, in excess of the limit prescribed by the Act of April 19th, 1905, P. L. 220. The exceptions filed, disclose the following material defects in the magistrate's record, as returned upon the Certiorari.

1. The suit is not brought in the name of, or for the use of, the Treasurer of the Township in which the offense was committed, to whom the Act of 1905 (*supra*) makes the fine recovered payable. This is an error in the form of the action. *Commonwealth ex rel. Ernst v. Metzger*, 2 York Leg. Rec. 53, *Commonwealth ex rel. Lewis vs. Flinchbaugh*, 1 York Leg. Rec. 1.

2. The magistrate's record does not in any manner whatever identify the particular Act of Assembly, for a violation of the provisions of which the defendant was convicted. There is no reference in the information, or in the subsequent proceedings of record, to the Act, by title, date of approval, page of the pamphlet laws, containing it, or otherwise; nor is there any recital of its provisions. This is an omission which leaves the record too incomplete, to show the jurisdiction of the magistrate

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and has been held fatal to the proceedings. Commonwealth vs. Brady, 5 Lanc. Bar, 2, Borough of Mahanoy vs. Mayorish, 30 Pa. Co. Ct. Rep. 455, Smith vs. Pierce, 10 Kulp 422, Commonwealth vs. Senft, 8 York Leg. Rec. 65, Hanover vs. O. Bold, 11 York Leg. Rec. 131.

3. The record shows a hearing, a conviction, and the imposition of a fine upon the defendant "at the Township of Manchester" instead of at the office of the Alderman in the City of York, where the process was returnable, and where the case should have been tried. A judgment so rendered cannot be sustained. Commonwealth vs. Blair, 17 Dist. Rep. 656, Bedford vs. Dewees, 9 Dist. Rep. 68.

4. The record does not set forth in detail, or with substantial accuracy, the testimony of the several witnesses, sworn on behalf of the Commonwealth, nor was it reduced to writing, or returned with the record. It appears that two witnesses were sworn, but what each testified to is not separately set out on the record even in substance. The Alderman states that they swore to the facts substantially as set forth in the complaint, with the added fact that the speed of the automobile was at a certain rate per mile. The evidence is not sufficiently detailed to enable the Court to determine whether or not all the essential ingredients of the statutory offense charged were duly proven at the hearing. Adams vs. Commonwealth, 1 Woodward 417, Commonwealth vs. Cannon, 32 Pa. Super. Ct. Rep. 81.

5. The record does not show, nor does any testimony referred to therein indicate by name or otherwise, upon what particular public highway, or at what point

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thereon, the alleged offense was committed. This is too indefinite to protect the defendant from danger of another conviction for the same offense. A similar defect has been held fatal to the proceedings in several cases.

Winter Bor. vs. Del. & Hud. Canal Co., 1 Dist. Rep. 701; City vs. Hughes, 4 Phila. 148.

The record shows no evidence that the automobile driven by the defendant was not one kept in stock for sale by him, as a manufacturer, or vendor, of motor vehicles, and not for hire or for private use. In such case it is contended that the defendant would be exempt from punishment for excessive driving, under the provisions of section 12, of the Act of 1905. But it has been held in the Commonwealth vs. Templeton, 16 District Reports 793, following the Attorney General's opinion. In re Automobile Acts, 15 District Reports, 83, that section 12 of the Act of 1905, in this regard, applies to motors and not to persons. It was intended to exempt from tagging, &c., such machines as manufacturers or vendors held in stock for sale only and not for hire or private use. But it does not exempt such manufacturers or vendors from the penalty for violating the speed limits of said Act. This exception would not, therefore, be fatal to the proceedings.

Neither do we think that the exception, that the record does not show that the defendant drove his automobile for a full mile at the alleged excessive rate of speed, is well taken. It is the rate of speed only that is prohibited. No distance over which the vehicle must be driven to constitute the offense is specified in the Act, and it can readily be seen that to put upon the statute, the construction contended for would defeat its purpose

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and prevent its enforcement in most cases arising in the streets of cities and boroughs.

For the above stated reasons the judgment of the alderman is reversed and the proceedings had before him are set aside.

Reported by J. Edgar Small, York, Pa.

Marshall Brown et al. v. George Gahring, et al.
Director of the Poor Etc.

The exercise of the police power by municipalities in detaining persons in quarantine involves ex necessitate a corresponding liability to support them during the period of detention, when they are prevented from maintaining themselves, in all cases where there is no statutory provision for their support otherwise.

The effect of the Act of May 28, 1907, P. L. 285, which provides generally "that whenever a head of a family or a person shall be quarantined by any authority, because of any infectious or contagious disease, or by reason of such quarantine, such person becomes unable to pay the expense, maintenance and treatment of his family or himself, during the period of quarantine he shall be considered a poor person or a needy and indigent poor person, within the meaning of the poor laws of the Commonwealth" is, therefore, to bring quarantined persons, while suffering from a temporary inability to support themselves, within the provisions of the general Poor Laws, entitling the indigent poor to relief.

QUARANTINE—POOR LAWS—TEMPORARY INABILITY OF
INDIGENT PERSONS—LIABILITY OF COUNTY.

No. 168, August Term, 1908, C.P. of York County.

Certiorari.

Raymond P. Sherwood, Attorney for Expectants.

John L. Rouse, Attorney, Contra.

Opinion by Wanner, A.L.J. October 19, 1908.

OPINION.

We are obliged to dismiss the exceptions filed to these proceedings because a certiorari does not lie thereto. This is not such a final judgment of the alderman as can be brought up for review in that way.

It is a statutory proceeding under the Act of June 13, 1836, P. L. 539, and the proper remedy of any parties

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aggrieved thereby, is an appeal from the order of the Alderman to the Court of Quarter Sessions, under the express provisions of sec. 44, of said Act. This has been held to be the only remedy under other sections of the same Act, giving a similar right of appeal. The hearing in the Quarter Sessions is upon the merits of the case, and is final, except that a certiorari will lie thereto, to determine the regularity of the record, without reviewing the facts. Poor Dist. vs. Poor Dist. 25 Pa. Super. Ct, 40. Walker vs. Jefferson Co. School Dist. 33 Pa. Co. Ct. 302. Derry Overseers vs. Brown, 13 Pa. 389.

But though we must dismiss these exceptions, for technical reasons, we are of the opinion that the Directors of the Poor are bound to extend relief to Marshall Brown and family under the several Acts of Assembly cited at the argument of the case.

Neither of the several Acts of Assembly authorizing the quarantining of infected persons, in cities, townships and boroughs, contains any provision for the maintenance of such persons during the period of their detention in quarantine, vide Act of May 23rd, 1889, P. L. 307, Art. XI, sec. 4.—May 11, 1893, P. L. 44, sec. 44.—Act of April 11, 1899, P. L. 38, sec 2, and June 18, 1895, P. L. 203.

But it has been repeatedly held that this exercise of the police power of municipalities, in detaining persons in quarantine involves *ex necessitate* a corresponding liability to support them during the period of detention, when they are prevented from maintaining themselves, in all cases where there is no statutory provision for their support otherwise. Berger vs. Alliance Bor., 28 Pa. Super.

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Ct. 407. Zellner vs. Allentown, 18 Pa. County Ct. Rep. 162, in re Kibby family, 12 Dist. Rep. 527. Comth. ex rel. Ziegler vs. Guy et al., 13 Dist. Rep. 214. Comth. ex rel vs. Irwin et al., Co. Commissioners, 29 Pa. County Ct. Rep. 591.

If there had been no subsequent law on the subject, the city of York would be liable under these authorities, for the support of Marshall Brown and family, during the period of their enforced quarantine under orders of the Board of Health of the City. But the Act of May 28, 1907, P. L. 285, provides generally, "that whenever any head of a family or a person, shall be quarantined by any authority because of any infectious or contagious disease, or by reason of such quarantine, such person becomes unable to pay the expense, maintenance and treatment of his family or himself, during the period of quarantine he shall be considered 'a poor person' or 'a needy and indigent poor' person within the meaning of the poor laws of this Commonwealth." There is no repealing clause to this act, nor as will be observed does it specifically fix any liability upon any district or municipality for the expenses of maintaining such quarantined persons. It simply fixes the legal status of a party during the period of quarantine, as that of a "poor person" or a "needy and indigent poor" person, within the meaning of the poor laws. It leaves the method of procuring relief unchanged from what it had been previous to this statute.

Under the general provisions of the Act of June 13th, 1836, P. L. 542, sec. 6, an order of relief from two magistrates is necessary to entitle a poor or indigent per-

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son to receive relief from the directors or overseers of the poor. *Kennedy vs. Poor District*, 15 Pa. Super. Ct. 1.

An order of relief is also necessary in York County, vide section 9, of the Act of Assembly of February 6, 1804, P. L. 65, under which Act, a special system was established for the maintenance of the poor in the County of York, which is still in force.

Under a supplement to said Act, vide Pamphlet Laws 1832, page 171, an order from a single justice of the peace is sufficient to entitle a pauper to relief, and a similar provision was contained in the Act of Assembly of March 2, 1846, P. L., 74 sec. 3., relating to Lancaster County, which was extended to York County, by the provisions of the Act of Assembly of March 3, 1847, P. L. 206.

All of the paupers of both the City and County of York are supported together in the same manner in the County Almshouse, under the provisions of said Act of 1804, *supra*.

The effect of the Act of 1907, *supra*, is therefore, to bring quarantined persons while suffering from a temporary inability to support themselves, within the provisions of the general Poor Laws, entitling the indigent poor to relief.

It gives them the right to procure an order of relief from two aldermen under the general Act of 1836, or from one under the York County Act of 1804, *supra*; which if regularly and properly granted, is binding on the Directors of the Poor of the County.

We have indicated our views of the law in regard to the liability of the Directors of the Poor in cases like this,

**Marshall Brown, et al. v. George Gahring, et al., Directors
of the Poor, Etc.**

though we decide this particular case on other grounds, because it was stated by counsel at the argument, that such an opinion was desired rather than a decision on merely technical grounds of objection to this particular order.

Now to wit, October 19th, 1908, the exceptions in the proceedings had before the Alderman are dismissed at the costs of the exceptants.

Reported by J. Edgar Small, York, Pa.

Buffalo, Rochester & Pittsburg Ry. Co.
v. Cunningham, et al.

Plaintiff Company, owner of a piece of land along its right of way in Union Township, Clearfield County, Pennsylvania, was assessed for local taxes in said Township, and in addition to the work road tax and cash road tax, for the years 1907 and 1908, was assessed the sum of One Dollar for each of said years. Plaintiff did not have an office or place of business within said Township and claimed for that reason not to be subject to the said tax of One Dollar.

Held, that the provision in Second Section under the Act of April 12, 1905, P. L. 142, providing "the road supervisors of each township shall assess the sum of One Dollar in addition to the millage tax" is a specific tax payable by whomsoever is liable for the millage tax, which is ad valorem, that is, based on the value of the article or thing taxed.

Held, further, first, that the Legislature had the power to pass the tax clause of this Act and that in so doing they did not violate any constitutional provisions; second, that the word "taxable" as used in the Act, cannot be construed to have been used in the same sense as the Legislature have in other cases used the words "per capita" and hence that this tax is not "personal;" third, that the words "every taxable" is intended and is broad enough to include non-resident as well as resident taxables; fourth, that the plaintiff is concededly a taxable of the Township of Union, although not a resident; and fifth, that the plaintiff is like every other taxable of Union Township, liable to One Dollar tax in addition to its millage tax, for property owned in the Township.

SUPERVISORS—SPECIFIC TAX—PER CAPITA TAX—MILLAGE
TAX—ACT OF APRIL 12, 1905, P. L. 142—CORPORA-
TIONS—NON-RESIDENTS.

No. 243, September Term, 1908, C. P. of Clearfield
County.

Murray & O'Laughlin, Attorneys for Plaintiff.

A. M. Liveright and Singleton Bell, Attorneys for De-
fendants.

Opinion by Smith, P. J. Nov. 24, 1908.

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OPINION

The plaintiff Company is the owner of a piece of land along its right of way in Union Township, Clearfield County, Pennsylvania assessable for local taxes in the said Township of Union, and in addition to the work road tax and cash road tax for the years 1907 and 1908, the defendant Township assessed the sum of one dollar against the plaintiff for each of said years. Plaintiff does not have an office or place of business within said Township and claims that for this reason it is not subject to the said tax of one dollar.

This one dollar tax is levied by virtue of the provisions of the second section of the Act of April 12th, 1905, P. L. 142, relating to road supervisors and their duties. Said second section enacts as follows: "The road supervisors of each township shall meet on the first Monday of March, 1906, and yearly thereafter; and after being duly sworn or affirmed shall organize as a board and shall proceed immediately to levy a road tax which shall not exceed ten mills on each dollar of valuation; this valuation shall be the last adjusted valuation for County purposes, and which shall be furnished to said road supervisors by the commissioners of the proper county; provided, that a greater rate than ten mills and not to exceed ten additional mills, may be levied by order of the Court of Quarter Sessions of th Peace of the County * * * and provided further, that upon every taxable the road supervisors of each township shall assess the sum of one dollar, in addition to the millage tax above mentioned * * *."

It is contended by the plaintiff that this proviso clause is not applicable to a non-resident of property in the

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township. The constitutionality of some portions of this section of the Act of Assembly was originally attacked on many grounds, but the Act was declared constitutional by the Superior Court in reversing the Court of McKean County, in Foster Township Road Tax case, 32 Superior Court Rep. 51. Also the exact question here raised has been decided in favor of the plaintiff by President Judge Walling, of the Erie County Court, in Millcreek Township vs. Willis, reported in 16 Pa. Dist. Court Rep. 312. Also in York County, in Township of Independence vs. Dodd, 17 D. R. 416 & 21 York L. R. 141. Warrington Township vs. Belt 6, Just. 191, also in York County, 34 C. C. 654.

In the Millcreek Township vs. Willis case, Judge Walling puts his decision entirely on the ground that the one dollar tax provided for by the Act of 1905 is not "levied upon property but against the person in the nature of a poll tax. The taxing power of a township cannot be extended so as to embrace a personal tax against a non-resident. A personal tax can be levied only at the place of residence. For the right to levy a poll tax depends on residence :27 Am. & Eng. Ency. of Law, second edition 634." "A person is not liable to a poll tax in more than one place and that is at the place of his residence; Preston vs. Boston, 12 Pickering 7."

This opinion, it will be noticed, is based entirely upon the assumption that this tax is a personal tax. In our judgment the tax levied by virtue of this proviso clause is not a personal tax nor in the nature of a poll tax. It is a specific tax, payable by whomsoever is liable for the millage tax, which is ad valorem, that is, based on the value of the article or thing taxed. As is said in Comth.

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vs. Lehigh Valley Railroad Co. 129 Pa. St. 429, "Specific taxes for a long series of years have been imposed within this State, not only upon particular classes of property, but upon classes of persons, and we have never known the power, when properly exercised, to have been called in question." We know of no constitutional prohibition in Pennsylvania against specific taxes or requiring that taxes shall be imposed upon property solely in proportion to value. The only constitutional provision of which we are aware, is that contained in Article 9, Section 1 to the effect that "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and should be levied and collected under general laws." As is said by Chief Justice Agnes, in Kittanning Coal Company vs. Comth. 79 Pa. St. 100, this requirement of uniformity upon the same class of subjects within a given territory does not "mean to separate the property from its owners or that property and not persons should pay taxes. This would be simply absurd for inanimate things cannot perform duties."

"The power of taxation possessed by the State may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the Constitution of the United States." Justice Field in Hagar v. Reclamation District No. 108, 111, U. S. 701-709. The same Justice, in an able opinion in another case has said "It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the tax may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures,

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and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." State Tax on Foreign-Held Bonds, 15 Wallace 300-319. This legislative power of the State to tax persons and property may be delegated to the municipal divisions of the State, such as are townships, to be exercised of course within the corporate limits of such townships. Durach's Appeal, 62 Pa., St., 491; Butler's Appeal 73 Pa., St., 448. So also, the legislature has the power to impose double taxation, provided "it is done in such manner as to secure the uniformity which the Constitution requires. It cannot be done arbitrarily in a given case, but it may be done if the whole class to which the subject belongs is subjected to the burden in substantially the same manner." Comth. v. Fall Brook Coal Co., 156 Pa., St., 488-495.

By virtue of this Act it is true that upon each subject of taxation in townships there is something in the nature of double taxation, that is, a millage tax or tax based upon value and a specific tax of one dollar, but it is "uniform upon the same class of subjects within the territorial limits of the authority levying the tax." It seems to us, therefore, that the Legislature of the State had the power to subject the plaintiff's property to either a millage tax, a specific tax or both, as it did so, and that therefore this particular proviso of Section 2 of the Act of 1905 does not offend against the Constitution.

The Specific tax of one dollar is assesable upon "every taxable" and the plaintiff is a taxable in the Township. To relieve the plaintiff there must be something read into the Act. The contention of plaintiff is that it is confined

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to "resident taxables" or "taxable inhabitants" or "taxable persons," something which would restrict the application to residents or to natural persons. In the Act there is no such restriction and it is not for courts to legislate, especially where such legislation results not in uniformity but in lack of uniformity. It seems to us that the Courts which decide against the collectibility of this one dollar fell into error of misinterpreting the word "taxable."

The Supreme Court, in Chester's Annexation, 174, Pa., St., 177, defines "a taxable is, one who is or who may lawfully be, taxed. One who possesses all the qualifications necessary to authorize the proper taxing authority to assess him with a tax." A taxable, as we understand it, may be a person, a corporation, or many persons, or even many corporations. A, B, C and D, in which A may be an individual, B a corporation, C a co-partnership, and D an estate of a person deceased, are assessed with one or more pieces of real estate and some personal property in a township, jointly or as co-owners. As such joint or co-owners they are a "taxable" within the meaning of this Act and assessable with only one dollar specific tax, although composed of a number of people and the items to which they are assessed composed of a number of pieces of property, real and personal. It is not, therefore, a personal or poll tax.

It is fair to presume that the Legislature, in passing this Act, had in mind the distinction between the word "taxable" and "per capita" or poll tax. When the Legislature by the Act of 22d July, 1897, P. L., 305, authorized "a per capita tax of one dollar for school purposes," they put said per capita tax upon 'each and every male inhabitant of the age of 21 years and upwards within their respective districts.' In this act, therefore, it is limited or restrict-

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ed to residents. In this Act it is the taxable who is assessable with this one dollar, and a taxable is not necessarily a resident. So also, in the case of Warrington Township, v. Belt, *supra.*, Justice Wanner sustains a reason to strike off a tax lien for this one dollar. "3. Because the law provides no remedy for the collection of a poll tax for the filing of a lien like this." In a short opinion he sustains this objection, *inter alia*, on the ground that there is no statutory provision either by the Act of 1901, which is the general tax lien Act, or in this Act of 1905, for entering up a lien for this personal tax and enforcing payment as attempted. We think this reasoning is also based upon false premises, namely, that this tax is personal.

The subjects of taxation in the State of Pennsylvania are those created by statute, particularly by the Act of 15th April 1834, P. L., 512, which directs "assessors to take an account of the names and sur-names of all the taxable inhabitants within their respective wards, townships and districts, and also an account of the following real and personal property (1) real estate, namely * * * (2) personal estate * * * (3) all offices and posts of profit, professions, trades and occupations, and all single freemen above the age of 21 years who shall not follow any occupation or callings."

By the Act of 1905, the road supervisors of each township are empowered to take the list furnished by the County Commissioners of the "last adjusted valuation for county purposes" and upon that to assess ten mills, and in addition to said millage tax they are empowered to assess one dollar upon "every taxable." This one dollar tax, therefore, is put upon the same level with respect to the subjects of taxation as is the millage tax. If the millage tax

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can be entered as a lien, it is because it is assessed on that which is the subject of lien, namely, real estate. For the same reason the specific tax can be entered as a lien when the "taxable" assessed with it is so assessed because of the ownership of real estate. Of course, against many of the subjects of taxation, such as personal property, posts of profit, professions, trades, occupations, or "single freemen of twenty one years of age who do not follow any occupation or calling" there can be no lien entered under any Act. This is because the subject matter of the tax is not made the subject of lien by any law of the Commonwealth and not because the tax is "personal" in the sense used in the opinion in Warrington Township v. Belt, *supra*. The "taxable" of the Act is such because one of the many classes made the subject of general taxation, that is, either as owner of property, real or personal as a holder of a post of profit, as following a profession, trade or occupation, or as a single freeman, etc. The one dollar specific tax is therefore personal only when the subject matter is personal or individual. So also, assessing such tax does not separate "the property from its owners," nor does it thereby hold that "property and not persons should pay taxes", to quote the language of Chief Justice Agnew in Kittanning Coal Company v. Comth. *supra*. A non-resident could not well become a "taxable" in a township under any other class than as owner of property and particularly as owner of real estate. It is by virtue of such ownership the millage tax is put upon him, and it is equally by virtue of that ownership that this specific tax is assessed to him. Both taxes being incident to ownership, why should not both be the subject of lien against the real estate to which they are the incident. To our mind, this specific

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tax, by the very terms of the Act, is so obviously connected up with the millage tax provided for in the same act that we can see no sufficient reason why it is not equally enforceable by means of entering a lien against the real estate on which both are assessed.

These views run counter to the opinion of our brethren of the Bench already cited. The different conclusions reached are the natural outcomes of reasoning from certain basic premises. They call this one dollar tax "personal" which, if true, their conclusion may be right. In this opinion we have at some length endeavored to show that this tax is not "personal" and that the legislative power never so intended it. Whether the law is a wholesome one is not for us to say. Neither have we anything to do with the policy of the law, except as to constitutional limitations. Courts do not make laws, as that power is vested solely in the Legislature. And we believe, first, that the Legislature had the power to pass the tax clause of this Act and that in so doing they did not violate any constitutional provision; second, that the word "taxable", as used in the act, cannot be construed to have been used in the same sense as the Legislature have in other cases used the words "per capita", and hence that this tax is not "personal"; third, that the words "every taxable" is intended and is broad enough to include non-resident as well as resident taxables; fourth, that the plaintiff is concededly a taxable of the Township of Union, although not a resident; and fifth, that the plaintiff is like every other taxable of Union Township, liable to one dollar tax in addition to its millage tax for property owned in the Township.

In accordance, therefore with the terms of the case stated, judgment is entered for the defendant and against

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the plaintiff in the sum of Two Dollars, taxes for the years 1907 and 1908, with costs. At request of Counsel for plaintiff, exception is noted and bill sealed.

Reported by B. F. Chase, Clearfield, Pa.

Pymatuning Township v. Simonton

Section 2, of the Act of April 12, 1905, P. L. 142, requiring supervisors to assess each taxable the sum of one dollar in addition to the millage on their property, does not apply to a non-resident of the township, who owns property within the township.

TAXATION—ROAD TAXES—ROAD SUPERVISORS—POLL
TAX—ACT OF APRIL 12, 1905, SEC. 2, P.L. 142.

No. 134 Oct. Term, 1908, C.P. Mercer Co. Case stated.

The facts are stated in the opinion of the Court.

Fred A. Service, for plaintiff.

Opinion by Williams, P. J., Sept. 29, 1908.

OPINION

It appears, by the terms of the case stated, that the defendant, S. C. Simonton, resides in Hickory Township, in said county, and owns a farm or tract of land situated in Pymatuning Township; that the legally constituted authorities of the plaintiff township have assessed against the land of the defendant situate in said township the usual taxes for which it is liable, and which he is ready and willing to pay. In addition to the taxes so assessed against the farm land of the defendant, the road supervisors of the plaintiff township have assessed him with a road tax of one dollar. The defendant contends that the assessment of said last mentioned tax is without authority of law, and therefore refuses to pay the same. The sole question presented by the case stated for the opinion of the Court is the liability of the defendant for the road tax assessed against him by the road supervisors aforesaid;

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and this question must be determined by a construction, in the light of well established principles, of the Act of Assembly under which said assessment was made. As sustaining the action of its road supervisors, the plaintiff township relies upon the second proviso in section 2 of the Act of April 12, 1905, P. L. 142, relating to the election of road supervisors, the levy and collection of road taxes, etc., in the several townships of the Commonwealth, which is as follows:

“And provided further, That upon every taxable the road supervisors of each township shall assess the sum of one dollar, in addition to the millage tax above mentioned:”

The real question presented by the proviso above quoted is: Does it apply to a person who is a non-resident of the township but owns property therein? It is well settled on principle and authority that tax laws have no extra territorial force, and the taxing power of the State is generally limited in terms to property within the State: Am. & Eng. Encyc. of Law 2 Ed., Vol. 27, 637. Since the taxing power, as a general rule, is limited to property or persons within the State, the same general rule applies to the various subdivisions of the State, such as municipalities, counties, school districts, townships, etc.: Ibid, 648. In view of these well established general principles, it will hardly be contended that the road supervisors of the plaintiff township are clothed with any power or authority which extends beyond the limits of said township. If, then, their jurisdiction and authority are co-extensive with the limits of the township, it is clear that they are without power or authority to levy or assess taxes against persons or property residing or located

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beyond said limits. It is true that the proviso referred to authorizes and empowers the road supervisors of each township within the Commonwealth to assess "upon every taxable" the sum of one dollar in addition to the tax assessed against his real or personal property, but this language seems to refer only to such taxables as are residents of the township. Suppose that, instead of authorizing the assessment of one dollar against each taxable, the proviso had empowered the supervisors to assess the sum of one dollar against the property of each taxable; it would hardly be contended that such assessment could be levied against property situate beyond the limits of the township, and yet the construction contended for by the plaintiff township would be as reasonable in one case as in the other.

A consideration of the meaning of the word "taxable" will conduce to a proper construction of the proviso in which it is used. As used in the provisco quoted "taxable" is a noun, and when so used is defined by the Century Dictionary as "A person or thing subject to taxation; especially, a person subject to a poll tax." The tax contemplated by said proviso is clearly a poll or capitation tax, a specific sum laid upon the individual simply, without reference to his property, business, employment or other circumstances, and it is well settled that the right to levy such a tax depends on residence and not on citizenship: *Am. & Eng. Encyc. of Law*, 2 Ed., Vol. 27, 634. "The domicile of the taxable is the place of the imposition of the poll tax, and one person cannot have two domiciles for the purpose of taxation:" *Bouvier's Law Dict.*, 1096, and cases there cited.

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Applying this principle to the facts of the case at bar, it is clear that the defendant is liable for a poll tax only in Hickory Township, the place of his domicile, and that the road supervisors of Pymatuning Township were without authority to levy or assess against him the tax here complained of. To decide otherwise would be to hold that the same individual is liable to a poll tax in every township in the Commonwealth, provided that he is fortunate, or unfortunate, enough to be the owner of property in each of them. A construction which leads to such a result is its own refutation.

In *Preston v. City of Boston*, 12 Pick., 7, it was held that a person liable to be taxed in one town for his poll and personal estate could not legally be assessed for the same in another town; and if so assessed, even with his own consent, could not be compelled to pay the tax.

In *Millcreek Township v. Willis*, 16 Dist. Rep., 312, it was held by Walling, P. J., that a non-resident owning property in the township is not liable for a poll tax in said township, under the Act of April 12, 1905, P. L. 142.

To the same effect is the opinion of Judge Taylor, of Washington County, in *Independence Township v. Dodd*, 17 Dist. Rep., 416.

On both principle and authority, therefore, judgment must be entered on the case stated in favor of the defendant, and against the plaintiff township for costs.

ORDER

And now, September 29, 1908, this case came on to be heard on the case stated by the parties, whereupon,

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after due consideration, it is ordered and adjudged that judgment be entered in favor of the defendant, and against the plaintiff, Pymatuning Township, for costs.

Reported by James D. Emery, Mercer, Pa.

In Re Petition of Albert E. Cauffman

In a proceeding for violation of the Act of April 19, 1905, P. L. 220, where the information set out that defendant ran the machine a distance of 1320 feet in 24 3-5 seconds. Held, that the unit of distance fixed by the Legislature was one mile and not 1320 feet, and therefore the said Act of Assembly being a penal Act must be strictly construed, and defendant could not be convicted.

The seal of the Justice, bearing the following inscription, "Thomas B. Wilson, Justice of the Peace, Montg. Co., Pa." Held, not to be in due and legal form under the Act of April 23, 1903, P. L. 290, requiring Justices of the Peace to procure and use a seal of office, etc., "similar to the one used by notaries public, except that around the outer edge shall be the name of the Justice, his County and the words, Justice of the Peace," with a coat of arms of the state in the centre.

An action for violation of speed limit of automobiles should be brought by the party entitled to recover the fine or penalty. The suit must be instituted in the name of the municipal division entitled to receive the same or for its use.

Held, that a warrant issued under the Act of April 19, 1905, P. L. 220, and directed to a Constable of one County, does not confer upon said Constable the authority to make an arrest in another County, unless backed by a Justice of the Peace of the County in which the defendant may reside, or be found, and that the Act of May 2, 1899, P. L. 173, providing that a warrant may be executed by the person to whom it is directed outside of the County, has no relation to a Summary proceeding, under said Act of 1905.

ACT OF APRIL 19, 1905, P. L. 220—OFFICIAL SEAL OF JUSTICE OF THE PEACE—MILE LIMIT—WARRANT IN SUMMARY PROCEEDING.

No. 113 November Term, 1908, C. P. of Cumberland Co.
Habeas Corpus.

George M. Hays and S. B. Sadler, Attorneys for Petitioner.

A. G. Miller, Attorney, Contra.

Opinion by Sadler, P. J. November 16, 1908.

In Re Petition of Albert E. Cauffman.

OPINION

The relator, Albert E. Cauffman, is in the custody of Charles H. Marple, a constable, by virtue of a warrant issued by Thomas B. Wilson, a justice of the peace, residing at Eagleville, Pennsylvania. The return made to the writ by the respondent, Marple, justifies the arrest of the said relator by setting forth therein a copy of the warrant on which the arrest was made, which, in form is as follows:

County of Montgomery, ss.

Commonwealth of Pennsylvania,

To any Constable Greeting:

You are hereby commanded to take the body of Albert E. Cauffman, 132 North Pitt St., Carlisle, Pa., if he be found in the said county, and bring him before Thos. B. Wilson, Eagleville, Pa., one of our justices of the peace in and for said county, to answer the Commonwealth upon a charge founded on the affirmation of James H. Schrank that on August 29, 1908, Albert E. Cauffman, No. 3317, did run his automobile on the Lower Providence State Road, it being a public highway in the Township of Lower Providence and has violated an Act of Assembly approved the 19th day of April, A. D., 1905, entitled "An Act for the regulation of the speed of all motor vehicles," the said defendant did run his automobile 1320 feet in 24 3-5 seconds, which is about—miles in minutes, contrary to the Act of Assembly in such case made and provided, and further saith not.

And further to be dealt with according to law. And for so doing this shall be your warrant.

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Witness our said justice, at Eagleville, Pa., who hath hereunto set his hand and seal, the 1st day of Oct., A. D., 1908.

Thomas B. Wilson, J. P.

Commission expires May 7, 1910.

(Thomas B. Wilson, Justice of the Peace, Montgomery County, Pa.)

It is contended on behalf of the relator that the warrant did not justify his arrest and that he should be discharged from custody for the following reasons:

First. That no offense is set forth or charged in the warrant which justified the arrest or authorized the detention of the defendant.

The 5th Section of the said Act of 19 April, 1905, provides:

"Section 5. No person or persons shall be allowed to use, operate or drive any motor vehicle, as aforesaid, upon any of the public streets or public highways of the cities, boroughs, counties or townships of this Commonwealth at a speed greater than a mile in six minutes, within the corporate limits of any of the cities and boroughs thereof; outside of the corporate limits of any city or borough, as aforesaid, the lawful rate of speed shall not exceed one mile in three minutes: Provided, That in townships of the first-class the commissioners thereof may, by ordinance, fix a speed rate of not less than one mile in six minutes, in such sections of said township as they may deem such rate necessary for public safety. Provided, however, in the sections where such speed limit is fixed, the commissioners shall cause signs to be placed at dis-

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tances of not over one-half mile apart, which signs shall be readable from the highways, and shall set forth the speed limit and the penalty for the violation thereof: Provided further, That this section shall not permit any person or persons to drive an automobile at a greater speed than is reasonable, regarding traffic, danger or injury to property or person, at any time or at any place."

It is thereby made unlawful to run automobiles at a greater speed than one mile in three minutes; yet, it is insisted that the commission of no such offense is set forth or charged in the warrant; that it was not made unlawful by the said act to run 1320 feet in 24 3-5 seconds. That the unit of distance fixed by the Legislature was one mile and not 1320 feet, and that it does not appear in the warrant, in terms that this was a greater rate of speed than one mile in three minutes.

That it is a penal act, and must, therefore, be strictly construed, and especially is this case when it directs that the fine or penalty shall "be collected by summary conviction before a magistrate or justice of the peace."

That it is not the duty of the Court to make a computation of what portion of a mile 1320 feet are, and also find whether the time in which the same was run was at a greater rate of speed than one mile in three minutes.

That it is not for the Court thus to acquire and take judicial notice of what the rate was, in the absence of an averment in the warrant. The only inquiry for it to make being whether the warrant, in the phraseology in which it is couched charges the offence prescribed in the Act of Assembly. It is also urged that it was manifest that the Legislature intended to fix certain units of distance, which should not be traversed as a whole in not less than a fixed

In Re Petition of Albert E. Kaufman.

period, is further shown and that this is emphasized by the further and subsequent provision that "in sections where such speed limit is fixed the commissioners shall cause signs to be placed at not over one-half mile apart, etc."

Interpretation of a statute must be most favorable to the accused.

In the early case of *Gallagher vs. Neal*, 3 P. & W. 183, where an action was brought against an ex-sheriff for taking illegal fees while in office, Chief Justice Gibson held that no recovery could be had under an act providing for the recovery of a penalty from "any officer taking other or greater fees than those provided in the fee bill thereby established" because it did not apply "to a person out of office for services rendered while in office." This eminent justice stating, among other things, that "whatever we might suspect the design of the Legislature to have been, the law being penal in its consequences must be strictly construed, and the case is therefore not within its purview."

"The Court cannot go beyond the words of the act. It is better to confine ourselves to it. It would be attended with risk to yield to speculations as to the intention of the Legislature in a criminal case."—*Daniels v. Commonwealth*, 7 Pa. 371.

When the erection of a wooden building was forbidden by act of assembly within the City of Pittsburg, it was held that a building partly of wood and partly of brick was not in violation of the statute.—*Stewart v. Commonwealth*, 10 Watts, 306.

Justice Sergeant, who delivered the opinion of the Court, saying:

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"Being a penal statute, and this proceeding being of of a criminal cast, the rule of law is well settled that such statutes are to be construed strictly, and that no one is to be brought within the penalty of the act who is not within the plain meaning of the act strictly construed."

In *Commonwealth v. Hollister*, 1 C. P. 146, where a writ of habeas corpus was sued out by one who had been arrested for a violation of the 47th section of the act of 1st May, 1876, P.L. 66, relating to the transaction of the business of a foreign insurance company, it was held that as the defendant appeared to be the agent of the National Mutual and Association of Columbus, Ohio, and that it was not such an insurance company as contemplated by the act, he was discharged from custody.

Again, in *Schott v. Harvey*, 105 Pa. 222, it was decided that the owner who had leased his premises, was not liable for failure to comply with the act of 11 June, 1879, P. L. 128, which provides that certain factories, etc., shall be provided with fire escapes by the "owners."

Paxson, Justice, saying that "It is certainly a highly penal statute. It imposes a duty unknown to the Common Law. It is almost needless to say that such an act cannot be extended by implication to parties who do not come strictly within its terms."

Gordon Justice, in delivering the opinion of the court in *Sunbury Steam Ferry Boat Company v. Heim*, 4 Penn., 352, stated that "even if there was a doubt about the construction, it would under the well settled rules of law be our duty to resolve that doubt in favor of the public. The penalty cannot be imposed on the defendant if we have any serious hesitancy as to whether he has or has not done that which subjects him to the imposition."

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See, also *Clemens v. Commonwealth*, 7 Watts, 485; *Bucher v. Commonwealth*, 103 Pa. 528, *Luck v. Commonwealth*, 10 D. R. 500; *Commonwealth v. Mansfield*, 12 D. R. 103.

It has been held that there is no reason for not applying these general principles even in the construction of penal ordinances. The construction must be most liberal for the defendant.—*Phila. v. Costello*, 17 Sup. Ct. 339.—Here an ordinance forbade the casting of paper bills and circulars in the vestibules of dwellings, but, excepting “Newspapers and addressed envelopes,” and it was held that “a circular enclosed in an envelope addressed To the Lady of the House,” and thrown in a vestibule, was not within the prohibition of the ordinance.

While we are inclined with hesitancy to coincide with this view on behalf of the relator, yet, as he is entitled to discharge for other reasons, as hereinafter stated, our determination will not be based solely on this ground.

Second. It is also contended by the counsel for Mr. Kaufman that there is no justification for a proceeding under the act of 19th April, 1905, P. L. 220, in the form in which the present one has been instituted.

The 11th section of the act provides that “all fines and penalties collected under the provisions of this act shall be paid to the city, borough or township treasurer wherein the offense is committed, and the same shall be expended by said city, borough or township for the benefit of the public roads.”

The 10th section provides “that the fine or penalty may be collected by summary conviction before any magistrate or justice of the peace, as like fines and penalties are now by law collectible.”

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The fine or penalty, if recoverable, is not payable in whole or in part to the Commonwealth.

The action, if one laid, should have been brought by the party entitled to recover such fine or penalty. The commonwealth has no interest in the same. It could not be held liable for costs should there be a failure to secure judgment. The right to receive gave the right to sue, but the right to sue is not conferred upon one not entitled to receive. The suit must be instituted in the name of the municipal division entitled to receive the same, or for its use.— Comth. ex. rel., *Ernst vs. Metzger*, 6 Kulp, 408.

The warrant on which the relator has been arrested sets forth that he is required to appear "to answer the Commonwealth," not "the township of Lower Providence, or for its use," who alone is entitled to the fine, if any be collectible from him.

In the case of *Commonwealth v. Winchester*, reported in 3 Clark 34, Justice Lewis early decided that an action cannot be maintained in the name of the Commonwealth when it has no interest. In that case an action had been brought to recover a penalty of fifty dollars for selling foreign goods contrary to Act of 28th of March, 1799, P.L. 359, and providing that one-half should go to the informer and the other half to the county. The action was instituted in the name of the Commonwealth, and the learned justice on appeal entered judgment for the defendant, saying amongst other things "she (the Commonwealth) has no interest; she is not entitled to any part of the penalty, for one-half goes to the informer and the other half to the county, and no portion of the penalty goes to the Commonwealth. She cannot be made liable for the costs of the action in case of failure in the suit.

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Amendments are not allowed in penal actions with the same degree of liberality which is extended to civil suits. But in this case improper parties are joined. No amendment but an entire change of parties can cure the defect, and this cannot be allowed. If several persons join in an action on a cause existing in only one, the action cannot be maintained. In this case, several have joined when only one has a cause of action, and the interest of the county is entirely omitted; the suit is brought with the avowed purpose stated on the record, of giving to the Commonwealth the moiety which belongs to the county. The defect is incurable, and judgment is therefore ordered for the defendant."

A like view was taken in *Adams v. Commonwealth*, 1 Woodward, Dec. 417, the Court, however, being of the opinion that record was amendable in that case.

The fact is that in the present case we have a warrant for the defendant to appear and answer to a charge made by one who under the Act of Assembly has no authority to bring the action or compel the defendant to respond to wit, the Commonwealth.

If the determination in *Commonwealth v. Borden*, 61 Pa. 272, seems to be at variance with this view, at first sight, an examination of the facts, of the case, will not lead to such conclusion. The court there said that "the prohibited acts were made criminal offenses punishable upon conviction before a justice of the peace. The proceeding was not to give a quitam action of debt, notwithstanding a moiety of the penalty is paid to the informer."

"The Act itself directs the proceeding to be by conviction, and is, therefore, properly brought in the name of the Commonwealth."

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It was not a proceeding for the collection of a penalty which the Legislature had directed should "be collected as like fines and penalties are now by law collectible," as is provided for in the act now under consideration.

Third. It is also urged that it does not appear from the warrant that the offense was committed in the county in which the proceedings were instituted. The warrant does not set forth that Lower Providence township is in the county of Montgomery. The Court has no knowledge, judicial or otherwise, that it is the name of one of the townships of said county of Montgomery.

It is insisted that this is a jurisdictional fact, and that its omission is a fatal defeat in the proceeding.

It was also decided in *Commonwealth v. Phelps*, 170 Pa., 430, by our Supreme Court, in an opinion rendered by Justice McCullom, and it is not for us to disregard the law as thus settled in our Commonwealth by its highest appellate tribunal.

It is also objected that the seal of the justice does not show with sufficient definiteness and certainty where the justice resides, or where his district is located. The seal is inscribed "Thomas B. Wilson, Justice of the Peace, Montg. Co., Pa." The warrant is signed "Thos. B. Wilson, J.P."

Hampton L. Carson, attorney, in replying to a justice of the peace in Tioga county, who had made inquiry as to whether his seal was in due form, replied as follows:

"It is quite clear that your seal is not in compliance with the terms of the Act of the 23d of April, 1903, P.L. 290. A seal containing the arms of the State in the center, with your name, followed by the words: 'Justice of the

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Peace,' and still further followed by the words, 'Osceola, Tioga county, Pa.', all in the margin or outer edge of the seal, would be proper."

The Act of 23d of April, 1903, P.L. 290, requiring justices of the peace to procure and use a seal of office, etc., provides that "said seal shall be similar to the one used by notaries public, except that around the outer edge shall be the name of the justice, his county and the words, justice of the peace."

It is also to be noted that the Act of Assembly of 2d of May, 1899, P.L., 176, providing that a warrant of a judge, alderman or justice may be executed by the person to whom it is directed, outside of the county when granted, and under which it is claimed that the arrest in the present case is justified, provides "that the warrants so as aforesaid issued shall be stamped with the official seal of the officer issuing the same, which seal shall contain the name and official title of said officer, and the state and county in which he resides."

It is also to be noted that it has been held by the Supreme Court of Texas that Courts do not judicially know that "La." is an abbreviation for Louisiana. *Russell v. Martin*, 15 Texas, 238, or that "Mo." is an abbreviation for Missouri. *Ellis v. Park*, 8 Texas, 205. It can hardly be, therefore, denied that a grave doubt is raised whether in this proceeding it is for the Court to judicially know and declare that Montg. Co., Pa., is an abbreviation for Montgomery county, Pennsylvania.

Fourth. It is also objected that the warrant was addressed to "any constable;" that it should have been directed to a constable of the County of Montgomery by name; that indeed it does not appear by the warrant that

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Charles L. Marple is a constable, or that he was entrusted with its execution.

The case of Paul v. VanKirk, 6 Binney, 123, has been cited before us, and it is contended that the determination therein made supports this contention on behalf of the relator.

We do not deem it necessary to pass upon this question.

Fifth. And lastly, it is strenuously contended that in a summary proceeding such as this, when the warrant is directed to a constable of one county, there is no authority thereby conferred on him to make an arrest in another county, certainly not unless backed by a justice of the county in which the defendant may reside or be found. In other words, that the justice was without jurisdiction to issue a warrant under which defendant might be arrested in another county.

The Courts do not look with favor upon the institution of such a proceeding to recover fines and penalties. It has been frequently held by them that it should be resorted to only in cases when the party is unknown or liable to leave the county.

The very fact that such limitation has been suggested is strongly indicative that the judges so holding did not contemplate that a defendant might be followed into any county of the Commonwealth. While under the Act under consideration, provision is made for the collection of the fine or penalty by summary conviction before a magistrate or justice of the peace, as such is, "to be collected as like fines and penalties are now by law collectible."

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The practice recognized as the proper one has been an action in debt (since the Act of 1887, *assumpsit*).

The only exceptions justified being the ones heretofore referred to, to-wit: When the party was unknown or liable to leave the county; that is, to get out of the jurisdiction of the justice.

By the criminal procedure Act of 31st of March, 1860, it was provided that a person charged with a felony, provision was made for the issuance of a warrant by the judge of the Court of Common Pleas, where found requiring the sheriff of said county to take the person charged and conduct him to the county where the felony was alleged to have been committed; but it is also provided by the third section of said Act that "in case any person against whom a warrant may be issued by any judge or alderman of any city, or justice of the peace of any county in this Commonwealth, for any offense there committed, shall escape, go into, reside, or be in any other city or county out of the jurisdiction of the judge, alderman, justice or justices of the city or county granting such warrant as aforesaid, it shall and may be lawful for, and it is hereby declared to be the duty of any alderman, justice or justices of the city or county where such person shall escape, go into, reside, or be, upon proof being made, upon oath or affirmation, of the handwriting of the judge, alderman, justice or justices granting such warrant, to endorse his or their name or names on such warrant, which shall be sufficient authority to the person or persons bringing such warrant, and to all other persons to whom such warrant was originally directed, to execute the same in such other city or county, out of the jurisdiction of the alderman, justice or justices, grant-

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ing such warrant as aforesaid, and to apprehend and carry such offender before the alderman, justice or justices who indorsed such warrant, or some other alderman, justice or justices of such other city and county where such warrant was indorsed, and in case the offense for which such offender shall be so apprehended, shall be bailable in law by an alderman or justice of the peace, and such offender shall be ready and willing to give bail for his appearance at the next court of general jail delivery or quarter sessions, to be held in and for the city and county where the offense was committed, such alderman, justice or justices shall and may take such bail for his appearance, in the same manner as the alderman or justice of the peace of the proper city or county might have done, and the said alderman, justice or justices of the peace of such other city or county so taking bail, shall deliver or transmit such recognizance and other proceeding to the clerk of the court of general jail delivery or quarter sessions, where such offender is required to appear by virtue of such recognizance, and such recognizance and other proceedings shall be as good and efficient in law as if the same had been entered into, taken or acknowledged in the proper county where the offense was committed, and the same proceedings shall be had therein; and in case the offence for which such offender shall be apprehended in any other city or county, shall not be bailable in law by an alderman or justice of the peace, or such offender shall not give bail for his appearance at the proper Court having cognizance of his crime, to the satisfaction of the alderman or justice before whom he shall be brought, then the constable or other person so

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apprehending such offender, shall carry and convey him before one of the aldermen or justices of the peace of the proper city or county where such offence was committed, there to be dealt with according to law."

That an arrest such as made in this case is certainly unauthorized unless the Act of 2 May, 1899, P.L. 173, provides otherwise.

This Act of 1899 is entitled "An Act to amend section three of an Act entitled 'An Act to consolidate, revise and amend the laws of this Commonwealth relating to penal proceedings and pleadings,' approved the thirty-first day of March, Anno Domini, one thousand eight hundred and sixty, so as to dispense with the endorsing or backing of warrants by aldermen and justices of the peace out of the jurisdiction of the alderman or justice granting the warrant, and to require aldermen and justices to keep an official seal, and stamp all warrants granted with said seal."

It had relation then to, and only to what is embraced in, and referred to, in the third section of the Act of 1860. That is, to offences (crimes) committed in the jurisdiction of the judge, alderman or justice of one city or county by one who escapes, goes into, resides or is found in another city or county outside of their jurisdiction.

This third section, as amended by the Act of 1899, reads as follows:

"Section 3. That in case any person against whom a warrant may be issued by any judge or alderman of any city, or justice of the peace of any county in this Commonwealth, for any offense there committed, shall escape, go into, reside, or be in any other city or county out of the jurisdiction of the judge, alderman, or justice

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of the city or county granting such warrant as aforesaid, it shall and may be lawful for the person to whom such warrant was originally directed, or the person having such warrant for execution, to execute the same, and arrest such offender in such city or county, out of the jurisdiction of the alderman justice or justices granting such warrant aforesaid, and to carry the defendant before any alderman, justice or justices, in the city or county in which such offender may be apprehended; and in case the offense for which such offender shall be so apprehended shall be bailable in law by any alderman or justice of the peace, and such offender shall be willing and ready to give bail for his appearance at the next court of general jail delivery or quarter sessions to be held in and for the city and county where the offence was committed, such alderman, justice or justices, in the city or county where such offender was apprehended, shall and may take such bail for his appearance, in the same manner as the alderman or justices of the peace of the proper city or county might have done; and the said alderman, justice or justices of the peace of such other city or county so taking bail, shall deliver or transmit such recognizance and other proceedings to the clerk of the court of general jail delivery or quarter sessions, where such offender is required to appear by virtue of such recognizance, and such recognizance and other proceedings shall be as good and effectual in law as if the same had been entered in to, taken or acknowledged in the proper county where the offence was committed, and the same proceedings shall be had therein; and in case the offense for which such offender shall be apprehended in any other city or county, shall not be

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bailable in law by an alderman or justice of the peace, or such offender shall not give bail for his appearance at the proper court having cognizance of his crime, to the satisfaction of the alderman or justice before whom he shall be brought, then the constable or other person so apprehending such offender, shall carry and convey him before one of the aldermen or justices of the peace of the proper city or county where such offense was committed, there to be dealt with according to law: Provided, That the warrants so as aforesaid issued shall be stamped with the official seal of the officer issuing the same, which seal shall contain the name and official title of said officer and the state and county in which he resides."

It will be observed that this provides that when the offense is bailable in law by any alderman or justice, the defendant may give bail, and he may do so before a justice of the peace or alderman in the county where apprehended, conditioned for his appearance at the next court of quarter sessions of the county where the offense was committed, and that such recognizance shall be given or transmitted to the clerk of the said court where such offender is required to appear by virtue of such recognizance.

To hold, therefore, that this act applies to the collection of fines and penalties which are to be collected by summary proceedings, as such fines and penalties are now collectible by law, is too strained a construction to be justified or tolerated. This section, as well as the third one of the Act of 1860, manifestly has in contemplation offenses, that is, crimes which are triable in the quarter sessions; not actions for the recovery of money by a sum-

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mary proceeding, from the determination in which no appeal can be had unless especially allowed.

The Act of 1899, in our opinion, has no relation to such a summary proceeding as that under consideration. It refers only to offenses denominated crimes and misdemeanors, which are triable in the criminal courts by a jury, and in which, when bailable before an alderman or justice, he may enter into a recognizance to appear before such courts for trial.

The proceeding in this and like cases is not only in derogation of the common law and operates to the exclusion of a trial by jury, with no right to appeal, however much the penalty imposed may exceed \$5.33, unless specially allowed; but, also, the proceeding is based upon a penal act—is of a criminal cast, and therefore the jurisdiction must be strictly and rigidly confined to that given by the statute alleged to confer it; and where there is reasonable doubt as to whether it is embraced within the enactment invoked, that doubt must be resolved in favor of the defendant. To hold that this proceeding may be maintained, would be to confer a power on justices and aldermen liable to the greatest perversion and abuse, and would possibly result in the extortion of onerous and undue exactions from citizens of the Commonwealth who use automobiles as vehicles for traveling. Indeed, if common and seemingly well founded rumor were to be considered by us we would be compelled to hold that such has already been quite common.

Other objections were urged against the validity of the proceeding, by which the relator was taken into cus-

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today, but as we do not consider them as tenable, further discussion is needless.

The letters of the justice to the relator, which were offered in evidence on the hearing, were not considered in coming to our determination, and the objections to their admission, as well as to all the testimony offered on behalf of him, were well taken and are sustained.

We are well satisfied, therefore, that the taking of the relator into custody by the warrant under which it is attempted to justify his arrest, gave no lawful authority so to do.

"Even when a judgment has been rendered, but it appears that the commitment is without cause or the process is simply void, the party imprisoned under it is entitled to his discharge on a habeas corpus, although there be no reversal of the judgment."—*Comth. ex rel. Steward v. Irwin*, 1 Clark, 408.

And now, November 16th, 1908, the relator is discharged from custody.

Reported by F. H. Hoffer, Carlisle, Pa.

Commonwealth v. Norman B. Ringler

The Court of Quarter Sessions has not original jurisdiction in actions for fines or penalties, under the Automobile Act of 19 April, 1905, P.L. 217.

The Magistrate, before whom the proceeding is commenced, must first either acquit, or convict and sentence, before the case can come into Court, either by Appeal or Certiorari.

JURISDICTION J. P., Q. S.—FINES AND PENALTIES— AUTOMOBILES—DUTIES OF MAGISTRATE.

No. 146, October Sessions, 1908. Q.S. Montgomery Co.

Sur Motion to quash return and demurrer thereto.

J. H. Maxwell, Attorney for Defendant.

Opinion by Weand, J., Jan. 4, 1909.

OPINION.

The defendant was arrested upon a warrant charging him with a violation of the Automobile Act 19 April, 1905, P.L., 217.

At the hearing before the magistrate, the defendant pleaded "not guilty," and was held in \$300.00 bail for his appearance at Court.

The magistrate did not convict the defendant.

Upon the return of the proceedings to Court, the District Attorney, doubting his right to indict the defendant without a previous conviction by the magistrate and proper appeal therefrom, now moves the Court to quash the return.

The Act of 1905 is crudely drawn and raises the question as to the proper form of proceeding, i.e., whether

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by summons or warrant, and as to original jurisdiction, i.e., whether before the magistrate or the Court. From the nature of the offence, summary proceedings to arrest became necessary because of the difficulty of identification or place of residence of the offender. To first make information and then arrest by warrant when the offender is at a place unknown to the officer, would afford immunity in a majority of cases. The 8th Section of the Act, therefore, provided for arrest with or without warrant. The arrest was for the offence and the officer had nothing to do with the character of the punishment or the form of the proceedings.

The Section further provides that the magistrate before whom he is first taken shall take bail "for a hearing or for his appearance at Court," and the Court, after a trial of the defendant, may dispose of the motor vehicle if deposited as bail.

This Section pre-supposes an arrest for a misdemeanor in violation of the Act, but also implies action by the magistrate.

Did this Section stand alone, the duty of the magistrate would simply be to hold the defendant for trial at Court, because it contains no authority to inflict punishment or to have a hearing.

To arrest and return to Court, without a hearing, would be against the law, and, therefore, Section 10 of the Act completes the proceeding, by providing the penalty and its method of infliction. The words are "any person violating any of the provisions of this Act shall be subject to a fine or penalty of not less than Ten Dollars, nor more than Twenty-five Dollars, to be collected by summary conviction before any magistrate or justice of

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the peace, as like fines and penalties are now, by law, collectible; or in case of non-payment of the fine within forty-eight hours, to undergo an imprisonment in the County Jail for a period of ten days." This clearly imposes the duty of conviction on the magistrate. This is the only Section and the only method provided by the Act by which the arrested party can be summarily punished. It is a quasi criminal proceeding, and must be pursued according to the terms of the Act. When the Act says he shall be summarily convicted by the magistrate, how can we change this to the Court? When this defendant was arrested and taken before the magistrate, the duty of the latter was to hear the case, and if the evidence warranted it, impose the penalty. As the case is now before the Court, the essential feature of the punishment is missing, i. e., there is no act of the magistrate to collect the fine or penalty by summary conviction before him. The Act does not provide for an appeal, but this remedy for the defendant is supplied and afforded by the Constitution and the Acts of Assembly relating thereto.

By Section 11, all fines and penalties, etc., shall be paid to the City, Borough or Township Treasurer wherein the offense is committed, showing that it is not an original proceeding by the Commonwealth.

If of a criminal nature by warrant of arrest, the suit would be entitled Commonwealth of Pennsylvania to use of the respective borough, city, or township; if of a civil nature, in the name of the district entitled to the money.

Although the offense is in violation of the Act of Assembly, the penalty enures to the district. The case of *Hoffman v. the Commonwealth*, 123 Pa., 75, is in point. The Act of 1881, June 8, P.L. 82, provided a punishment

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for trespass on fields, orchards, etc. The proceeding was to be before a magistrate who could fine or imprison for non-payment, but the defendant could appeal, etc. The magistrate, instead of imposing the penalty, committed the defendant to jail for trial in default of bail. The defendant filed a motion to quash the indictment, which motion was sustained by the Supreme Court. In the course of the opinion it is said "the case must reach the Quarter Sessions by the road prescribed by the Act of 1881. The proceeding must *begin before a Justice of the Peace, who must hear and decide the cause*. If the defendant is convicted and sentenced, he may comply with the sentence or refuse to do so. If he refuse to comply, the Justice may proceed to commit him to jail, unless he enter into a recognizance for his appearance in the Court of Quarter Sessions, to answer, etc. The giving of his recognizance ends the proceedings before the justice, and the case goes to the Quarter Sessions for another trial. It is in the nature of an appeal from a summary conviction, and the defendant has no right under the Act of 1881, to offer his recognizance until after sentence, *nor has the Justice any right to send the case to the Quarter Sessions until after conviction, sentence, and a refusal to comply with the sentence*. The Justice's record, when it comes into the Court of Quarter Sessions, should show the conviction and sentence, as well as the recognizance, for the duty of that Court is to try the defendant upon the same charge and, upon conviction, to sentence him to pay the penalty fixed, and costs, etc. *The jurisdiction of the Quarter Sessions is not an original, but a supervisory one*, intended to protect a defendant against the mistakes of a magistrate before committing him to prison for non-compliance with

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the sentence." The italics are our own. The Act of 1881 provided for an appeal direct from the magistrate. Under the Act of 1905, it must be upon allowance by the Court.—McGuire, et ux., v. Borough of Shenandoah, 109 Pa., 613.

The original jurisdiction of the Court of Quarter Sessions in cases of fines, penalties and punishments imposed by an Act of Assembly for offences, misdemeanors or delinquencies, is conferred by the criminal procedure Act of 1860, P.L. 427, Section 32, cl. v. *except* where it is expressly otherwise provided and enacted.

That the first conviction must be before a magistrate is also conclusively shown by the increased penalty for a second offence, which can only be imposed on one who has previously been convicted before a magistrate or justice of the peace.

If the Court of Quarter Sessions has jurisdiction of the first offence, it could not impose the increased penalty for a second offence if the offender was again in Court, for there would be no first conviction before a magistrate required by the Act. We are unable to explain the meaning of the provision in Section 8, that "if the defendant is unable to give sufficient bail for a hearing, or for his appearance at Court," the motor vehicle shall be held, unless it applies to the security to be entered on appeal.

And, January 4, 1909, the motion to quash is sustained and demurrer over-ruled.

Reported by A. R. Place, Lansdale, Pa.

Commonwealth v. Joseph S. Knight

Under Section 10 of the Automobile Act of April 19, 1905, P.L. 217, the charge for a second offence must be tried before a Magistrate.

The Court of Quarter Sessions has no original jurisdiction in such case.

**AUTOMOBILE ACT OF APRIL 19, 1905, P.L. 217—SECOND
OFFENCE—JURISDICTION Q.S.**

No. 54, October Term, 1908, Q.S. of Montgomery Co.

Opinion by Weand, J., Jan. 4, 1909.

OPINION.

This defendant was arrested under a warrant charging him with a violation of the Automobile Act of 19 April 1905, P.L. 217.

It differs from the case of *Commonwealth v. Ringler*, No. 146, October Sessions, 1908, in that the justice having found that it was the second offence committed by defendant he returned the case to Court for trial. This raises the question as to whether the Quarter Sessions has original jurisdiction for the second offence. It is assumed that it has because the second offence is characterized as a misdemeanor.

When the penalty for the first violation is a fine or penalty, the proceeding can be by warrant or summons, but for the second it should probably be by warrant, as in case of ordinary misdemeanors, but this is a mere opinion. If the Act had intended the proceeding to be in the Quarter Sessions, it would have so said, but there is nothing in the 10th Section which makes such distinction.

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Bouvier's Law Dictionary defines "misdemeanor," in criminal law a term used to express every offence inferior to felony, punishable by indictment, or by particular prescribed proceedings.

In its usual acceptation, it is applied to all those fines and offences for which the law has not provided a particular name.

It includes all indictable offences which do not amount to felony, but not including a multitude of offences over which magistrates have an exclusive summary jurisdiction.—Ibid.

It will be observed that for the first offence the defendant shall be subject to a fine or penalty, but for the second or subsequent offence, upon conviction thereof, shall be *sentenced to pay a fine*, the word penalty being omitted. The Act partakes of both of a civil and criminal character. The procedure can be either a case or summary conviction, or a suit for a penalty, but the second offence should also be tried by a magistrate. The use of the word misdemeanor has no significance, for the first is also a misdemeanor, and the same Section provides a proceeding for both offences.

The opinion just filed in Commonwealth v. Ringler is made part of this case.

And now, January 4, 1909, the motion to quash is sustained.

Reported by A. R. Place, Lansdale, Pa.

Orr v. Baltzell

The summons to defendant to appear before "Wm. F. Smith, J.P., at his office, No. 3, 2d Story, Stemple's Building, Fayette Street, Conshohocken, Pa.," sufficiently designates the location of the Justice's office.

Proceedings will be reversed where the summons was not issued to the constable of the proper township, or the one most convenient to defendant, because of the additional costs placed upon defendant.

SUFFICIENT DESIGNATION OF JUSTICE'S OFFICE IN SUMMONS—TITLE TO REAL ESTATE—JUSTICE'S RECORD—SUMMONS TO BE ISSUED TO CONSTABLE MOST CONVENIENT TO DEFENDANT.

No. 72, June Term, 1908, C.P. of Montgomery County.

Certiorari.

Henry M. Tracy, Attorney for Plaintiff.

P.P., for Defendant.

Opinion by Weand, J., October 5, 1908.

OPINION.

No depositions were taken to sustain the exceptions, and for this reason the first exception is over-ruled.

The third exception complains that the summons does not set forth sufficiently the location of the Justice's office in that it does not state the ward or the number of the street. It does, however, command the defendant to appear before "Wm. F. Smith, J.P., at his office, No. 3, 2d story, Stemple's Building, Fayette St., Conshohocken, Pa.," and we hold this to be sufficient.—Purnell v. Mc-Breen, 16 Montg., 111.

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The 4th exception complains that the "constable did not hand the defendant a true copy of the writ, etc." This is contradicted by the return of the constable under oath.

5th, want of jurisdiction as "the title to real property is involved." There is nothing shown by the record to sustain this assertion.

The 2d exception sets forth that the "writ was not issued to a constable of Chetlenham township, in which the defendant resides, nor to the next constable most convenient thereto." The lower Courts are almost, if not entirely, unanimous in holding this point to be good as a defense. In all the cases, however, it was shown, either by depositions or by the record, that the Justice had not complied with the law, i.e., that it was not issued to a constable of the proper township or the one most convenient thereto.

In our case it is contended that a prior suit against this defendant and her husband had been brought before the same Justice for the same debt, in which her residence had been given as Cheltenham township, and this record now before us sustains the assertion, this being an alias summons and part of the first suit. The Court will take notice that Cheltenham township does not adjoin the Borough of Conshohocken. The constable charges 58 miles mileage, which also shows the distance from defendant's residence as bearing on the locality.

The reason given by the Courts for holding the parties to a strict requirement of the Act, is because of the additional costs placed upon the defendant. This is illustrated in this case.

Orr v. Baltzell.

The record of the Justice also shows that the claim was for work, etc., on defendant's house, at Wyncote, which is in Cheltenham Township.

Following the decisions, we are compelled to sustain this exception, and reverse the proceedings.

And now, October 5, 1908, the proceedings before the Justice are reversed as against Alice H. Baltzell, defendant.

Reported by A. R. Place, Lansdale, Pa.

W. H. Minick v. Mary D. Ford

Plaintiff brought suit upon a Promissory note before a Justice of the Peace. The record shows that parties were present and "Plaintiff sworn to the note," but it does not appear that defendant was heard. Exceptions were filed and the testimony taken upon the Exceptions discloses the fact that the Justice would not permit the defendant to testify. Held, that the matter of hearing the parties is not a matter of form, but is the very substance of the Justice's act. If he fails to hear the parties, there is no trial, and without trial the judgment would be a nullity.

When a Justice hears the parties, the determination of the question as to whether his judgment be correct or erroneous must be heard upon appeal, which is the remedy provided by the Statute, but when he determines without hearing both of the parties when present and competent to be heard, the Justice does not carry out the purpose for which his office is created under the Statute, and his act is a nullity.

PROMISSORY NOTE—HEARING PLAINTIFF ONLY—REFUSING TO HEAR DEFENDANT—RECORD OF JUSTICE—PAROL EVIDENCE—JUDGMENT.

No. 18, November Term, 1909, C.P. of Perry County.

Certiorari to W. A. Meminger, Esq., J.P., on judgment for plaintiff.

Seibert & Seibert, Attorneys for Certiorari.

Barnett & Son, Attorneys against Certiorari.

Opinion by Jas. W. Shull, P.J., January, 1909.

OPINION.

Plaintiff brought suit upon a promissory note containing a confession of judgment, before the justice, who issued a summons, and, at the day of the hearing, the defendant appeared. The record shows that the parties were present, and "plaintiff sworn to the note," but it

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does not appear that defendant was heard. After judgment for plaintiff, and issuance of execution, the proceedings were brought into Court upon a certiorari, at instance of defendant, who filed a number of exceptions. A single exception will be sufficient for our determination of the matter, viz: that the defendant appeared at the day of hearing, requested to be sworn, in order that she might testify that her signature to the note was a forgery, but the justice refused to administer the oath or permit her to testify in the cause. This fact of the refusal by the justice to permit her to testify is sustained by the testimony taken upon the exception. It does not appear by the record, and is, therefore, objected to by the plaintiff's counsel.

It is a general rule that in cases of certiorari, the Court is confined to the record of the Justice of the Peace and parol evidence, tending to show what took place at the trial, whether it be an act of omission or commission, is ordinarily inadmissible. But, there are exceptions to this general rule, whereby parol evidence is admitted, "to establish want of jurisdiction in the justice, his corruption or refusal to hear testimony."—*Road Commissioners v. Fickinger*, 51 Pa., 48. Each of these matters relate to the conduct of the justice, and do not pertain to the action of the parties in the suit, consequently, and may be established outside of the record.—*Fisher v. Nyce*, 60 Pa., 107. There is no imputation of corruption, but the same constitutional right is denied when there is a refusal to be heard, which is equivalent of partiality. In either of the circumstances, the party will suffer a wrong or injury. If we concede the right to determine the matter on the testimony taken upon the certiorari, and this is undoubted,

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(Worstall v. Meadowcroft, 1 Ash, 52), we must conclude that the judgment was void. To summon the defendant and refuse to permit her to be sworn or testify, when she was competent to testify, would be as illogical and illegal as to enter judgment against her without the issuance of a summons or her voluntary appearance. The Act which confers upon Justices of the Peace their powers and jurisdiction, and authorizes their issuance of the summons, provides (20 Mar., 1810, 5 Sm. L., 161), that "If the parties appear before the justice, either in person or by agent, the justice shall proceed to hear their proofs and allegations." The matter of hearing the parties, therefore, is not a matter of form, but is the very substance of the justice's act. If he fails to hear the parties, there is no trial, and without trial the judgment would be a nullity. The fact that he heard but one of the parties, when the other was present demanding a hearing, would stamp the act with partiality and as illegal, and a judgment rendered in such proceedings must necessarily be set aside. When a justice hears the parties, the determination of the question as to whether his judgment be correct or erroneous must be heard upon appeal, which is the remedy provided by the statute, but when he determines without hearing both of the parties, when present and competent to be heard, the justice does not carry out the purpose for which his office is created under the statute, and his act is a nullity.

And now, January, 1909, judgment reversed.

Reported by Walter W. Rice, New Bloomfield.

In Re William Appleman, Deceased

No report of viewing a body will be approved by the Court unless there were some suspicious circumstances which called for the view. The mere fact that a man dies suddenly and not under suspicious circumstances is insufficient for a view, and no view of this kind will be approved, nor will a view be approved where it is apparent from all the circumstances that the body viewed is that of a man who committed suicide.

CORONER'S INQUEST—SUDDEN DEATH—JUSTICE OF THE
PEACE ACTING AS CORONER—COSTS.

No. 4, March Sessions, 1909, C.P. of Pike County.

Viewing of body by Frank Keller, Justice of the Peace.

Opinion by Staples, P.J., March 17, 1909.

OPINION.

We gather from the transcript of the Justice of the Peace, submitted to Court, that he viewed the body of William Appleman, deceased, who died suddenly in the Township of Shohola, on December 23, 1908.

There is nothing in the report to show the circumstances under which the Justice of the Peace was called, nor from what cause the man died. We are disposed to assume that he was properly called, and is entitled to a fee for viewing the body. There is nothing, however, to show that he was entitled to any mileage, and we therefore approve the report which entitles the Justice of the Peace to a fee of \$2.75, but deduct mileage charged because it is not clear that the Justice is entitled to the same.

We desire, however, at this time, to call attention to all of the Justices of the Peace of the county of Pike

In Re William Appleman, Deceased.

that hereafter no report of any Justice of the Peace in said county, of viewing the body of a decedent, will be approved unless there appears in the report itself, as follows:

1st. The circumstances under which the deceased died, or how he was found dead.

2d. That there were suspicious circumstances connected with the death, which warranted the viewing of the body. (No report of viewing a body will be approved by the Court unless there were some suspicious circumstances which called for the view. The mere fact that a man dies suddenly, and not under suspicious circumstances is insufficient for a view, and no view of this kind will be approved, nor will a view be approved where it is apparent from all the circumstances that the body viewed is that of a man who committed suicide.)

3d. There must be reported what apparently is the cause of the man's death.

Unless these rules are complied with, no report will be approved, and, therefore, no fees will be allowed.

Reported by George R. Bull, Milford, Pa.

D. C. Williams v. the County of Montour

Where defendants are convicted for the violation of the Act of May 24, 1878, P.L. 125, Sections 1 and 2, and they fail and refuse to pay the fine and costs, and are thereupon committed to the county jail, in the custody of the sheriff and keeper of the jail, it is the duty of the sheriff to accept the commitment and receive the prisoners. The first section of the Act of April 11, 1856, P.L. 314, determines the county's liability, and the sheriff is entitled to be paid for the board of the prisoners. The justice of the peace cannot, under the Act of May 24, 1878, above cited, recover his costs from the county, for the reason that the Act does not note the county liable therefor.

DUTIES OF SHERIFF—COMPENSATION FOR BOARD OF PRISONERS—LIABILITY OF COUNTY FOR COSTS.

No. 45, October Term, 1908, C.P. of Montour County.

Assumpsit.

Ralph Kisner, Attorney for Plaintiff.

Edward Sayre Gearhart, Attorney for Defendant.

Opinion by Charles C. Evans, P.J., December 5, 1908.

CASE STATED.

And now, September 7th, 1908, it is hereby agreed by and between the attorneys for the respective parties to the above-stated action that the following case be stated for the opinion of the Court in the nature of a special verdict:

First. That on the 24th day of July, A.D. 1908, Andrew Kodak and Michael Manerick were arrested by special officers of the Philadelphia & Reading Railway Company, and were arraigned before William V. Oglesby,

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Esq., a justice of the peace of the First Ward of the borough of Danville, in the county aforesaid, charged with trespassing on certain trains of the said railway company, in violation of the Act of Assembly entitled "An Act for the prevention of trespassing upon railway trains and consequent injuries to minors and other persons."—Approved May 24th, 1878, P.L. 125.

Second. That Andrew Kodak and Michael Manerick were then and there convicted of said offence before the said justice of the peace, and were, each, by him, the said justice of the peace, sentenced to pay a fine of ten dollars and costs, and to be imprisoned in the county jail for the term of ten days.

Third. That the said convicts failed and refused to pay said fine and costs or either of them and that the said justice of the peace thereupon committed them to the county jail in custody of the said plaintiff as sheriff and keeper of the jail of said county.

Fourth. That the said convicts were thus in the custody of the said plaintiff and sheriff as keeper of the said jail, as aforesaid, for the said period of ten days and were boarded by him during such period of time.

Fifth. That upon the expiration of the time of their said imprisonment in the said jail, the said convicts were discharged by the said plaintiff, as sheriff, as aforesaid, by direction of the said justice of the peace, without said fine or costs being paid by either of said convicts.

Sixth. That after their said discharge the said plaintiff, as sheriff, aforesaid, duly demanded of the commissioners of said county the aggregate sum of nine dollars and sixty cents (\$9.60), for boarding the said convicts, during the said term of imprisonment in the said jail, to

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be paid out of the fund of the said county, and that the said commissioners did then and there refuse and still do refuse to pay to the said plaintiff the said aggregate sum or any portion thereof, and that the said commissioners allege as the ground of such refusal that said act of 1878 fixes no legal liability on the part of the said county to pay any costs and charges whatsoever in the premises.

If the Court should be of the opinion that the said county of Montour is liable for such costs and charges, then judgment should be entered for the said sum of nine dollars and sixty cents, in favor of the said plaintiff, but if not, judgment to be entered for the said defendant, the costs to follow the judgment, each party reserving the right to appeal from the judgment entered by the said Court before the proper Appellate Court

OPINION.

The plaintiff is the sheriff and keeper of the jail of Montour county.

On July 24, 1908, Andrew Kodak and Michael Manerick were arrested and arraigned before W. V. Oglesby, a justice of the peace of the borough of Danville, charged with trespassing on certain of the trains of the Philadelphia & Reading Railway Company, in violation of the Act of Assembly entitled, "An Act for the prevention of trespassing upon railway trains and consequent injuries to minors and other persons." Approved May 24, 1878, P.L. 125.

Kodak and Manerick were convicted before the said justice of the peace and were each sentenced to pay a fine of ten dollars and costs, and be imprisoned in the county jail for the term of ten days.

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They refused to pay the fines and costs and were committed to the county jail in custody of the plaintiff as sheriff of Montour county. They remained in the county jail for the said term of ten days and were boarded during the term by the plaintiff—the sheriff.

Upon the expiration of the term the convicts were discharged from jail by direction of the justice of the peace, before whom they were tried and convicted, without having paid the costs and fines imposed.

After the discharge of Kodak and Manerick from jail, the plaintiff, as sheriff, demanded of the county commissioners the sum of \$9.60 for boarding the said convicts during the said term of imprisonment. The county commissioners refused to pay the said sum or any part thereof, for the reason that the Act of May 24, 1878, fixes no legal liability on the part of the county to pay costs and charges.

Sec. 1 of the Act of May 24, 1878, P.L. 125, reads as follows: "Be it enacted, etc., That any person found entering, or being in or upon any railroad engine or car, whether the same be passenger, freight, coal or other car, on any railroad in any city or county in this Commonwealth, contrary to the rules of the person, persons or corporation owning or operating the same, and with the intention of being in or upon, riding or traveling upon, such engine or car, without paying fare, or of committing larceny, violence or destruction thereon, or of threatening, intimidating or assaulting travelers or other persons, upon such engines or cars, shall, upon conviction, forfeit a penalty of not less than five dollars nor more than fifteen dollars, which penalty shall be paid to the treas-

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urer of the school district in which such offense was committed for the use of said district, and such person so convicted shall be committed to the county jail of such county for a period not exceeding ten days."

And Sec. 2 thus: "Any constable or police officer, having knowledge or being notified of any violation of this act, shall forthwith arrest such offender and take him before any magistrate, alderman or justice of the peace, or any such magistrate, alderman or justice of the peace shall issue a warrant or capias for the arrest of any such offender, upon information duly made on oath or affirmation; and said magistrate, alderman or justice of the peace upon such person so charged being produced before him, shall forthwith proceed to hear and determine the matter in issue, and if he shall convict the person so charged with the violation of the provisions of this act, he shall proceed to pronounce the forfeiture of the penalty which he shall adjudge against the person so convicted, and shall commit the person so convicted to the county jail of the proper county for the period aforesaid; and if the person so convicted refuses or neglects to pay such penalty and costs immediately, then the said magistrate, alderman or justice shall commit the person so convicted to the jail of the county wherein the offense was committed for a further period not exceeding ten days."

It has been definitely decided by the Supreme Court that justices of the peace before whom convictions are had and sentences imposed under the act of May 24, 1878, for trespassing on trains can not recover their costs from the county, for the reason that the act does not make the county liable for the costs.—*Crawford Co. v. Barr*, 92, Pa., 359, and *Codding v. Bradford Co.*, 116 Pa., 53.

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Kodak and Manerick were arrested, convicted and committed to the county jail by the justice of the peace under the provisions of the said act. The sheriff accepted the commitment and received and boarded the prisoners in the county jail for the term of ten days. We scarcely see how he could have done otherwise. The act in plain terms authorized the justice of the peace to make the commitment to the county jail.

It is one of the duties of the sheriff to board the prisoners of the county. The compensation to be paid for the performance of this duty is governed by Act of Assembly passed for that purpose.—*Apple v. Crawford County*, 105 Pa., 302.

Sec. 1 of the Act of April 11, 1856, P.L. 314, provides that: "The sheriffs of the several counties of this Commonwealth * * * * to whom are committed the custody of prisoners shall hereafter receive such allowance for boarding said prisoners as may be fixed by the Courts of Quarter Sessions of the respective counties not exceeding twenty-five cents per day for each prisoner."

Kodak and Manerick were prisoners. They had been committed to the county jail. It was the duty of the sheriff—the plaintiff—to accept the commitment and receive the prisoners. The prisoners were received and detained in the county jail during the term imposed. They were boarded by the sheriff. The first section of the Act of April 11, 1856, P.L. 314, determines the county's liability.

And now, to-wit: December 5, 1908, in accordance with the terms of the case stated, judgment is entered in favor of the plaintiff for nine dollars and sixty cents.

Reported by Charles P. Gerhart, Danville, Pa.

Fleming Manufacturing Co. v.
Hector Township

Where a defendant township failed to appeal from a judgment against it within twenty days, an appeal nunc pro tunc will not be allowed where the only reason alleged is that it was misled by the provisions of the Act of April 22, 1905, P.L. 296, requiring the defendant township "to file, within one week from the time of rendition of said judgment, with the prothonotary of the county, a certificate signed by the plaintiff, naming the parties to the action in which said judgment was rendered, the magistrate by whom rendered, and setting forth the fact and date of the rendition of the same and the amount thereof."

TOWNSHIPS—FILING CERTIFICATE OF JUDGMENT WITH
PROTHONOTARY WITHIN ONE WEEK—APPEAL NUNC
PRO TUNC—JUDGMENT.

No. 115, June Term, 1908, C.P. of Potter County.

Rule to show cause why an appeal should not be allowed.

Nelson & Maynard, Attorneys for Plaintiff.

W. F. DuBois, Attorney for Rule.

Opinion by Ormerod, P.J., March 10, 1909.

OPINION.

The petition of the defendant avers that judgment was entered against it in September, 1905, before a justice of the peace.

That the plaintiff did not file the certificate with the prothonotary within seven days of the rendition of said judgment, required by the Act of April 22, 1905, P.L. 296.

That relying upon the provision of said Act that upon failure so to do, "that said judgment could not be used in

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evidence in any proceeding to enforce or collect said judgment," it did not appeal from said judgment.

That this Court declared said Act of April 22, 1905, unconstitutional. (See opinion filed in this case.) That it was misled by the provisions of said Act.

It now asks that an appeal be allowed "nunc pro tunc."

There is no allegation that the defendant did not know that judgment was entered against it.

The only reason alleged is that it was misled by the provisions of the Act of April 22, 1905.

The Act of Assembly regulating appeals from a justice provides that they must be taken within twenty days of the rendition of judgment.

We know of no case where the time has been extended where the defendant had knowledge of the date of the entry of judgment and made no attempt to appeal, and we are of the opinion that we have no power to provide the appeal asked for.

And now, March 10, 1909, the rule to show cause is discharged.

Reported by Nelson & Maynard, Coudersport, Pa.

In Re Closing of Licensed Places

The discretion committed to the Court in granting or refusing licenses, is controlled absolutely, on some points, by the provisions of the Statutes, such as the citizenship of the applicants; fitness of the applicants; necessity of the house. Such discretion is to be exercised upon evidence, together with personal knowledge.

The Court possesses no legal authority to impose conditions or restrictions upon the licensee at the time of granting of license, as for instance, making an order fixing 7 a.m. as the hour at which bar rooms may be opened, and 11 p.m. as the hour at which they must be closed.

DISCRETION OF COURT—LEGAL LAWS—RESTRICTING HOURS OF SALE.

No. 500, January Sessions, 1909, Q.S. of Luzerne County.

Opinion by Lynch, P.J., March 22d, 1909.

OPINION.

It is unlawful to keep a hotel where liquors are sold at retail, except a license therefor shall have been granted by the Court of the county. The Statutes and Rules of Court specifically set out the essentials of applications. The Fifth paragraph of Section Five, Act of 13th May, 1887, P.L. 109, provides the petition must aver that "the place to be licensed is necessary for the accommodation of the public."

The Court, having due regard to the number and character of the petitioners for and against an application, must find necessity for the house and the fitness of the applicant, before granting the license.

Upon sufficient cause being shown or proof being made to the Court that one holding a license has violated any law relating to the sale of liquors, the Court should revoke the license.

In Re Closing of Licensed Places.

Penalties are provided for permitting customary visitation of disreputable persons, or keeping a disorderly place; selling without a license; furnishing to any person spirituous liquors on election day, on Sunday, to a minor, a person of known intemperate habits, a person visibly affected by intoxicating drink; on a pass book or on an order book, or on order on a store to receive any goods in exchange for liquors; and any licensed hotel where liquors are sold in violation of the law, is held to be a nuisance.

There have been presented to this Court several petitions, signed by many citizens of the county, setting forth in substance that in their opinion an order of the Court, limiting the hours during which bar rooms or places licensed to sell liquors may be open would lessen drunkenness and crime and promote morality, and if compatible with judicial duty, to make an order fixing 7 a.m. as the hour at which bar rooms may be opened, and 11 p.m. as the hour at which they must be closed.

The discretion committed to the Court in granting or refusing licenses is not arbitrary, but judicial, and this is controlled absolutely on some points by the provisions of the statutes, such as the citizenship of the applicant. The fitness of the applicant, the necessity of the house, etc., is within the discretion of the Court, and is to be exercised upon evidence, together with personal knowledge. It is claimed that in considering the fitness of the applicant, the Court has the legal right to make the order asked for.

It may be assumed that under the provisions of the statutes, a disobedience of such order, if made, is not a criminal offense punishable by fine or imprisonment; also

In Re Closing of Licensed Places.

that there is no law which requires bars to be thus closed.

Suppose the licensee disobeys, shall the Court for this reason alone refuse a renewal of the license? The majority of the Court is of opinion that the making of such an order would put the Court in the position of bargaining with a suitor, in a way wholly unwarranted by law. "Duress by the Court imposes no greater obligation than duress by private persons."

Being of the opinion that the Court possesses no legal authority to impose conditions or restrictions upon the licensee at the time of granting a license, it follows that we have no power to direct at what time the bar shall be opened or closed.

Reported by G. Fred. Lazarus, Esq., Wilkes-Barre, Pa.

Commonwealth v. Miles Conable

In an action before a justice for the recovery of a fine for the violation of the Act of Assembly, relative to fishing in the waters of this Commonwealth, the justice must spread upon his record the testimony upon which he bases his judgment, and if the evidence satisfies him that the defendant is guilty of the offense charged, he must adjudge him guilty and make a record of the same. If the justice has not entered record of the conviction, there is nothing upon which the defendant could be sentenced.

FISH AND GAME LAWS—RECORD OF J. P.—TESTIMONY TO
BE SPREAD UPON RECORD—RECORD OF CONVICTION—
SENTENCE.

No. 85, December Term, 1908, Q.S. of Potter County.

A. R. Ensworth, District Attorney, for Plaintiff.

A. S. Heck, Attorney for Defendant.

Opinion by Ormerod, P.J., December 17th, 1908.

The defendant was charged before a justice of the peace "on the 19th day of September, 1908, with unlawfully taking food fish from the waters of the west branch Pine Cr  ek, in the said county, by the use of a spear, said waters being inhabited by brook trout. After hearing, defendant was fined \$25.00 and costs, in accordance with Section 48 of the Act of 1901."

Defendant took certiorari.

The third exception of the plaintiff in error is this: That it does not appear from any evidence as set forth by the record of the justice of the peace that any offense punishable under the laws of the Commonwealth has been committed.

Commonwealth v. Miles Conable.

OPINION.

The transcript from the record of the justice of the peace in the above-entitled case does not show that the defendant was convicted of any offense and is fatally defective for that reason.

There is nothing upon which the justice of the peace had any right to impose sentence. Justices of the peace in cases of this character must spread upon their records the testimony upon which he bases his judgment, and if the evidence satisfies him that the defendant is guilty of the offense charged, he must adjudge him guilty and make a record of the same. The justice of the peace having entered no record of a conviction of the defendant, there is nothing upon which the defendant could be sentenced. Therefore, judgment is reversed.

Reported by Nelson & Maynard, Coudersport, Pa.

Commonwealth v. William Welch

Where defendant is charged with having used dynamite, contrary to the Fish Law of May 29, 1901, P.L. 302, but according to the Commonwealth's testimony, casually met the men engaged in exploding the dynamite at the pond, and was only implicated by indirection, and this testimony is flatly contradicted and is clouded with some circumstances of uncertainty, he cannot be convicted.

USE OF DYNAMITE IN FISHING—SUMMARY CONVICTION— CONTRADICTION OF TESTIMONY—REASONABLE DOUBT.

No. 25, April Sessions, 1907, Q.S. of Susquehanna Co.

T. J. Davies, Esq., for Commonwealth.

J. M. Kelly and R. B. Little, Esqs., for Defendant.

Opinion by Fuller, L.J., July 28th, 1908.

OPINION.

Trial July 28th, 1908, before the Court on defendant's appeal from summary conviction upon charge of placing dynamite, etc., in Card's Pond, contrary to Section 26 of Act approved May 29th, 1901, P.L. 302.

FINAL DECISION.

This case has now been fully heard upon the merits as well as upon the technicalities.

The offense charged is one of the most brutal and abominable forbidden by statute of this Commonwealth.

Only a character hopelessly depraved could possibly be concerned in its perpetration.

The prescribed punishment is ridiculously inadequate.

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The State Fish Warden deserves the hearty commendation of all good citizens for his endeavor put forth in this prosecution to enforce this salutary law. At the same time we feel bound to observe that the delay of one whole year in bringing the case to trial against the present defendant, and the apparent absence of any vigorous effort to apprehend McKeeby and Stevens, the principal offenders, are unsatisfactory features which have contributed to an unsatisfactory result.

This defendant did not procure, place, or explode the dynamite. At most, if the Commonwealth's testimony be believed, he met those men casually at the pond and was only implicated by indirection.

That testimony is flatly contradicted, and is clouded with some circumstances of uncertainty.

After a careful consideration, while we might recognize a preponderance if this were a civil issue, yet on a criminal issue of such gravity we find ourselves unable to reach a positive conclusion of defendant's guilt beyond a reasonable doubt.

Accordingly, the summary conviction is now reversed, and the defendant is found not guilty.

Reported by H. A. Denney, Esq., Montrose, Pa.

P. S. Sedgwick, Sheriff of Erie County,
v. The County of Erie

The sheriff of a county is bound to receive prisoners committed by a Court of competent jurisdiction; and irregularities in the proceedings are no defence to an action by him for their board.

The county is liable for the board of prisoners committed to the county jail on convictions before the mayor of a city on the charge of disorderly conduct under the Acts of Assembly of June 25th, 1895, P.L. 271, and of May 2d, 1901, P.L. 132, and the sheriff can recover.

Since the Act of March 28th, 1905, P.L. 61, a county is not liable for the board of prisoners committed for violation of a city or borough ordinance.

Under the Act of Assembly of April 30th, 1879, P. L. 33, the offense of being a tramp, is a misdemeanor triable in the Court of Quarter Sessions, and the mayor of a city has no jurisdiction to try and convict a defendant on such charge; when he attempts to do so the whole proceedings are void, and a commitment which on its face shows such want of jurisdiction is also void. In such case the sheriff is not entitled to compensation for boarding the prisoner so illegally committed.

The fee of the sheriff of 50 cents for each commitment and a like fee for each discharge in any criminal matter, provided in said Act of July 11th, 1901, P.L. 665, constitutes a part of the costs of such case; and the county is not liable therefor unless liable for the other costs.

SHERIFFS—BOARDING PRISONERS—TRAMPS—FEES—COSTS
—MAYORS' CONVICTIONS—MISDEMEANORS—JURIS-
DICTION OF MAYORS OF CITIES—ACT OF JUNE
25, 1895, P. L. 271—ACT OF MAY 2, 1901,
P. L. 132—ACT OF MARCH 28, 1905, P. L.
61—ACT OF APRIL 30, 1879, P.L. 33—QUARTER SES-
SIONS—DISORDERLY CONDUCT—VOID CONVICTIONS—
PRISONERS—COUNTIES—LIABILITY OF COUNTY FOR
BOARD AND COSTS.

No. 194 September Term, 1906, C.P. of Erie County.

C. S. Burchfield, Esq., for Plaintiff.

P. S. Sedgwick, Sheriff of Erie County, v. The
County of Erie.

J. C. Thomas, Esq., for Defendant.

Opinion by Walling, P. J., January 7th, 1907.

OPINION.

This is an action to determine the right of the sheriff to compensation for boarding certain prisoners committed to the county jail by the mayor of Erie City; and also to determine his right to a fee from the county on the commitment and discharge of such prisoners. The parties waived a trial by jury. The facts are found as follows, viz:

First. Plaintiff is the duly elected and qualified sheriff of Erie county, and has been such since the first Monday in January, 1904; and as such, he is the keeper of the Erie county jail.

Second. That during the year 1905, he received and boarded various prisoners committed to the said jail by the mayor of Erie City on convictions for disorderly conduct. The record and the commitments set out that such convictions were under the Act of Assembly June 25th, 1895, and amended May 2, 1901. See Act June 25, 1895, P.L. 271, and Act of May 2, 1901, P.L. 132.

Third. That the allowance for boarding prisoners in Erie county is \$2.75 per week; and that the board of said prisoners amounts in all for said year to \$255.72.

Fourth. That a part of said commitments have written at the end thereof the words "Labor in stone yard." There is no stone yard connected with the county jail, but the city has such a place, and the prisoners so committed

P. S. Sedgwick, Sheriff of Erie County, v. The
County of Erie.

were boarded and lodged at the jail, but worked on the stone yard in charge of the city police officers.

Fifth. Some of the said prisoners were committed for terms longer than that specified in the Act; but practically none were boarded at the jail longer than the 30 days provided in the Act. In some of said commitments the duration of the imprisonment is not stated and in some others there is the further charge made against the prisoners of being tramps.

Sixth. During said year, plaintiff boarded certain prisoners committed to jail by said mayor upon commitments setting out that such prisoners had been convicted before the mayor of being tramps, contrary to the Act of April 30th, 1879, (P.L. 33.) The board of prisoners so committed amounts to \$9.82.

Seventh. There were 107 of said prisoners received and discharged by plaintiff and he also claims from the county a fee of 50 cents for each commitment and a like fee for each discharge, in all \$107.00, pursuant to the Sheriff's Fee Bill in the Act of July 11th, 1901, P.L. 665.

Eighth. All of plaintiff's claims as above stated on being presented by him to the County Auditors were disallowed, from which he appealed to this Court.

Ninth. All fines obtained from said prisoners were retained for the use of the city.

LEGAL CONCLUSIONS.

First. That where prisoners are committed to jail on convictions before the mayor of a city, on the charge of disorderly conduct under said Acts of Assembly, the

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county is liable for their board, and the commitments, for which plaintiff claims, having been under said Acts, he is entitled to recover the sum of \$255.72 for the board of such prisoners.

Second. That a sheriff is bound to receive prisoners committed by a court of competent jurisdiction, and in such case irregularities in the proceedings are no defence to an action by him for the board of such prisoners.

Third. That since the Act of March 28th, 1905, P. L. 61, a county is not liable for the board of prisoners committed for violation of a city or borough ordinance, but none of the prisoners in this case were so committed.

Fourth. That the offence of being a tramp, under the Act of April 30th, 1879, P.L. 33, is a misdemeanor triable in the Court of Quarter Sessions; and the mayor of a city has no jurisdiction to try and convict defendant on such charge; and when he attempts to do so the whole proceedings are void, and a commitment, which on its face shows such want of jurisdiction, is void; and the sheriff is not entitled to compensation for boarding a prisoner so illegally committed. And, as such facts appear on the commitments, plaintiff is not entitled to the \$9.82 claimed in this case.

Fifth. That the sheriff's fee of 50 cents for each commitment and a like fee for each discharge in any criminal matter, provided in said Act of July 11th, 1901, P.L. 665, constitutes a part of the costs of such case; and the county is not liable therefor unless liable for the costs of the case, and the county is not liable, under the facts of

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this case, for said sheriff's fee or for the other costs in said disorderly conduct cases; and plaintiff is not entitled to recover said \$107.00, or any part of it from the county in this case.

AUTHORITIES.

The Act of February 24, 1770, 1 Sm. Laws, 309, requires the county to pay for the board of all persons committed for any criminal offence whatsoever; and the said statutory offence of disorderly conduct is a criminal offence within the meaning of said Act.

Burton, Sheriff, v. City of Erie, 11 District Reports, 384.

Burton v. Erie County, 206 Pa., 570.

The proceedings before the mayor were irregular and doubtless might have been reversed on certiorari or appeal. But as the mayor had jurisdiction the proceedings in the disorderly conduct cases were not void; and it was the sheriff's duty to receive and keep the prisoners so committed. In the last-above cited case, the Supreme Court says: "If the commitment be in form and made out by a properly authorized officer, whether a judge of a court of record, coroner, mayor, alderman or justice of the peace, the sheriff must obey it; he is not clothed with the functions of a court of errors and appeals, he cannot sit at the jail door and determine as on a certiorari that the proceedings were irregular, or as on appeal, that the commitment was unjust to keep the prisoner; his single duty is to receive and safely keep." In some cases the sentence was for a longer term than provided by law; but, as the mayor had a right to commit, the sheriff could not for that

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reason refuse to receive the prisoners. Practically no claim is here made for boarding any prisoner for a longer term than is provided by law. The mayor had no right to direct that any such prisoners "labor in stone yard." Such direction would be void; but that would not vitiate the commitment. It is the duty of the sheriff to keep in his custody and under his control all prisoners duly committed to the county jail. When, however, the commitment is on its face void for want of jurisdiction, then it affords no protection to the sheriff, and he can acquire no right to compensation for the board of a person unlawfully detained thereby. But, where the commitment is sufficient, the sheriff may act thereon; and it is no part of his duty to examine the records as to prior proceedings in the case. The sheriff's fees on commitments and discharges in criminal cases is a matter separate from the prisoner's board.

Manifold v. City of York, 15 District Reports, 101.

But the county's liability for such fee is another question. Such liability is purely statutory. The said Act fixing the sheriff's fees makes no provision that the fees above-mentioned shall be paid by the county; and we know of no Act that does so provide. And it has been repeatedly held that in such cases the county is not liable.

Dougherty v. Cumberland County, 26 Superior Court, 610.

Becker v. Lawrence County, 8 Superior Court, 41.

See also Gilkyson v. County of Bucks, 84 Pa., 22.

Crawford County v. Barr, 92 Pa., 359.

Bradford County v. Wells, 125 Pa., 319.

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ORDER.

And now, January 7th, 1907, the Prothonotary is directed to give notice to above-stated parties, or their attorneys, of the filing of this decision; and if no exceptions are filed hereto within thirty days after the service of such notice to enter judgment hereon in favor of the plaintiff and against the defendant for the sum of two hundred and fifty-five and 72-100 (\$255.72) Dollars and costs of suit.

Reported by J. E. Reed, Esq., Erie, Pa.

Selner v. Mason

Where plaintiff's claim was right and could have been used as a set-off in a former suit of defendant against him, justice had no jurisdiction and proceedings will be reversed.

Defendant, having no appeal, can show by parol that evidence was rejected and the existence of the prior suit.

JURISDICTION OF J.P.—SET-OFF—PAROL EVIDENCE—
PRIOR SUIT.

No. 94, October Term, 1907, C.P. of Montgomery Co.

Certiorari to Justice.

Harry S. Ambler, Attorney for Defendant.

Opinion by Weand, J., Feb. 6, 1908.

OPINION

The first exception alleges that the justice had no jurisdiction because the plaintiff (Selner) failed to set off his present claim in a suit for debt brought against him by the present defendant in a suit before a justice of the peace on August 20, 1906.

There is appended to the exceptions a copy of the justice's record in the suit referred to, wherein no mention is made of a claim for a set-off, but judgment given for whole amount of plaintiff's claim. The record also shows that the defendant took an appeal, but we are in ignorance as to whether any further action was taken or whether the case is still pending.

At the time of the 1906 suit the present plaintiff's claim was ripe and could have been used as a set-off.

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We think the case is ruled by *Felpel v. Hershour*, 128 Pa., 587, (1899). The jurisdiction of the justice having attached in the first suit, the present claim should have been offered as a set-off under the provisions of the Act of March 20, 1810, Section 7, 5 Sm. Laws, 161. As the defendant could not appeal, he can show by parol that evidence was rejected and the existence of the prior suit.

And now, Feb. 6, 1908, the first exception is sustained, and the proceedings reversed, and judgment for defendant below, Mason.

Reported by A. R. Place, Esq., Lansdale, Pa.

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William Siebert, Et. Al.

Mandamus will lie to compel the performance by public officers of duties purely ministerial in their character, but as to all acts and duties necessarily calling for the exercise of judgment and discretion on their part, mandamus will not lie. Whilst the writ may perhaps be awarded to set the latter class of officers in motion and to compel action upon particular matters over which they have jurisdiction, it will in no manner interfere in the exercise of that discretion, nor control or dictate the judgment or decision which shall be reached.

Inasmuch as no appeal from the decision of the Board of revision is expressly given by statute by any other person than to the landowner, no other was intended and the assessor, the taxpayers of the District, and the Commonwealth are without the right of appeal in such cases. Each individual landowner may have redress of his own grievance, but if others feel aggrieved because their neighbor's land, as they believe in the final revision of his assessment, has been assessed too low in point of value or of acreage, it would seem that they are without redress.

The right of appeal is given to the individual, but not to the assessor or to the public as to whom the decision of the Board of Revision is conclusive, except it might be in extraordinary cases.

MANDAMUS—DUTIES OF PUBLIC OFFICER—APPEALS FROM
ASSESSMENT—ASSESSORS—LAND-OWNERS.

No. 4, June Term, 1908, C.P. of Butler County.

Mandamus.

Mr. Greers, Attorney for Plaintiff.

James B. McJunkin and Williams & Mitchell, Attorneys
for Defendant.

Opinion by J. M. Galbreath, P.J., August 3d, 1908.

OPINION.

The pleadings in this case are not in strict accord with the rule of practice in proceedings of this kind. The

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petition is in due form and on it an alternative writ of mandamus was duly awarded. No writ, in fact, ever issued and the issue thereof was waived by counsel for the respondents. Regularly the writ should have issued in the alternative form, unless it appeared from the petition itself that it should issue in the first instance in peremptory form. To the writ thus issued in alternative form, it was the duty of the respondents to make return, setting forth that they had done the things required by the writ, or if not, then their reasons for not doing so. At this point the pleadings proper begin. If the respondents, in their return, set out that they have complied with the mandate of the writ, that is the end of the matter. If, however, they have not done so, and in their return set out their reasons for their refusal, the petitioner may then, by way of reply, demur to the sufficiency of the return as a matter of law, and thus raise an issue of law to be decided by the Court, or he may deny the facts set out in the respondent's return and thus raise an issue or issues of fact to be tried by a jury. The proper practice in mandamus proceedings is indicated in the following cases: *Kell v. Rudy*, 1st Sup. Ct., 507; *Kuhbach v. Irving Cut Glass Company*, 220 Pa., 427.

In the case at bar, the respondents waived the issue of the writ and filed answers thereto as a rule to show cause. For the purpose of disposing of the case, we may treat the writ as having issued and the answers filed as being equivalent to a return duly made thereto by the respective respondents refusing to do the things commanded in the writ and setting out their reasons for such refusal. These reasons are for the most part of a legal character, and on their face raise issues of law which, if

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determined in favor of the respondents, are decisive against the right of the petitioners.

The answer filed by John W. Grossman and Miriam Grossman, his wife, sets out the absence of power on their part to revoke, revise, change or modify the official Act of the County Commissioners, and asks that the petition as to them be dismissed. As the purpose of a writ of mandamus is to secure the performance of a public function, by those who have the power and whose duty it is to perform the function, it seems quite clear that the said John W. and Miriam Grossman are not proper parties to the writ. They are the alleged owners of the land, the valuation of which was changed by the County Commissioners, sitting as a Board of Revision. They have no authority to modify the Act of the Board and a writ commanding them to do so would be futile.

The same is true of Robert K. Grossman, clerk for the County Commissioners, who, in his answer, set forth that he holds a clerical position under the Board of County Commissioners, and, as such, has no authority over their acts.

The County Commissioners, who constitute the Board of Revision by which the assessment complained of was revised, by way of answer, say that the duties devolving on them as such Board were judicial in character, involving the examination of evidence and the exercise of their judgment thereon, and that, having done so, they can not be compelled, by writ of mandamus, to exercise their judgment in a different manner from that in which they did exercise it. The rule in such cases is stated in *Runkle v. The Commonwealth*, 97 Pa., 332, as follows: "Where a person or body is clothed with judicial

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deliberative or discretionary powers, according to his or its discretion, mandamus will not lie to compel a revision or modification of the decision resulting from the exercise of such discretion, though, in fact the decision may have been wrong." To the same effect is the statement of the rule in the case of *Dechert v. The Commonwealth*, 113 Pa., page 235, as follows: "It is well settled that mandamus will lie to compel the performance by public officers of duties purely ministerial in their character, but it is equally well settled that as to all acts and duties necessarily calling for the exercise of judgment and discretion on their part, mandamus will not lie. Whilst the writ may perhaps be awarded to set the latter class of officers in motion and to compel action upon the particular matters over which they may have jurisdiction, it will in no manner interfere with the exercise of that discretion, nor control or dictate the judgment or decision which shall be reached." There can be no doubt that the duties of the Board of Revision are judicial in character, and that in revising the assessment complained of, the respondent acted in that capacity.

The Court is now asked to compel them, by mandamus, to undo what they have done and "to reinstate the assessment and the return of the assessor, Martin L. Croll." Thus, we are asked to compel them not only to reverse their judgment, but to exercise it in a particular way by re-instating the assessment as originally returned. We think that the Court is without power to do this. The right of the petitioners to have the writ they ask for must be clear. It must be equally clear that they are without a specific legal remedy. "While the remedy by mandamus is a strictly legal one, the decisions require that the

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applicant must establish the specific legal right as well as a want of a specific legal remedy and also that the writ will be granted only in extraordinary cases to prevent a failure of justice."—*Mercur v. Electric Light Company*, 19 Sup. Ct., page 524.

The Act of April 19th, 1889, P.L. 37, provides that: "Any owner of real estate or taxable property in this Commonwealth, who may feel aggrieved by the last or any future assessment or valuation of his real estate or taxable property, may appeal from the decision of the County Commissioners or Board of Revision and appeal to the Court of Common Pleas" within sixty days after the decision of the Board of Revision has been made. This act does not provide for an appeal from the decision of the Board of Revision by the assessor or the body of the tax payers of the District, or by the Commonwealth, nor has any statute been brought to our attention which expressly gives such appeal. If we assume that the right of appeal is mutual and that where the owner may appeal, the assessor, the tax payers or the Commonwealth may exercise the same right; yet it would manifestly have to be exercised within the same time, that is, within sixty days after the hearing of the appeals by the County Commissioners. This was not done.

It is our judgment, however, that inasmuch as no appeal from the decision of the Board of Revision is expressly given by statute to any other person than to the land owner, no other was intended, and the assessor, the tax payers of the District and the Commonwealth are without the right of appeal in such cases. This means that they are without specific legal remedy by appeal from the decision of the Board of Revision regarding the assess-

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ment of an individual land owner. He alone has that remedy. Does it also mean that all others are without redress in such a case? We think it does. Each individual land owner may have redress of his own grievance, but if others feel aggrieved because their neighbor's land, as they believe, in the final revision of his assessment has been assessed too low in point of value or of acreage, it would seem that they are without redress. Each individual owner of real estate may appeal from the assessment made by the assessor to the County Commissioners, sitting as a Board of Revision, and if their decision is not satisfactory to him, he may appeal to the Common Pleas Court, but as to all others, the decision of the Board of Revision is, we think, conclusive. It is not without significance that the statute which gives the land owner the right of appeal gives it to no other. We may well believe that the law-making body had in mind that the County Commissioners, in whom resides the power of taxation for county purposes, would be interested in having all property assessed at its full amount and valuation, and that the interests of the public, as to individual assessments, would be amply protected by them, but that they might in greater probability err in the other direction by fixing or permitting assessments at a too high valuation. Hence the right of appeal was given to the individual, but not to the assessor or the public, as to whom the decision of the Board of Revision is conclusive, except it might be in extraordinary cases.

Our conclusion is that where the subject matter with which the Board of Revision was dealing was within its jurisdiction and its powers of revision were exercised in good faith, its decisions are conclusive upon all except

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the individual owner. "The Legislature has thought proper to place the assessment and collection of taxes in the hands of county and township officers, and has constituted the County Commissioners generally, the appellate tribunal for the correction of the assessments."—*Hughes v. Kline*, 30 Pa., 230. And again in the same case it is said: "Wherever this power of revision has been reposed in addition to the necessity of the process being summary, for the same reason, its action is to be final and conclusive, whether it be the act of a Court specially authorized, or that of the County Commissioners. To such tribunals constituted for the purpose, parties dissatisfied on account of excessive taxation must appeal."

In *Clinton School District Appeal*, 56 Pa., 317, it was held that under the Acts of April 14, 1864, P.L. 419, and March 30, 1866, relating to bounty taxes in Butler county, the power of making exonerations being vested in the School Directors and no appeal given, the judgment of the Directors, in a case within their jurisdiction, is final. The Court in that case says: "All of the cases assert the doctrine that when the general power to assess exists, the proper remedy for illegal taxation is by appeal to those to whom the appeal is required to be taken; and if none be given, neither the Common Pleas nor this Court can revise the judgment of tax officers." And this same rule is repeated in numerous subsequent cases. We are convinced that in so far as the assessor and the public are concerned, the decision of the Board of Revision is conclusive. If this view be correct it follows that the applicants are not entitled to a writ of mandamus against the County Commissioners. First, because their decision is conclusive against the said petitioners; and, second, because the

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awarding of the writ would be an effort on the part of the Court to coerce the judgment of the said Commissioners, sitting as a Board of Revision and exercising judicial functions. For these reasons, the petition for mandamus is dismissed at cost of the petitioners this third day of August, 1908.

Eo die, a bill of exceptions is sealed for the petitioners.

Reported by Williams & Mitchell, Esqs., Butler, Pa.

John Caikosky v. Mike Kuscenski and
Anthony Yaculoitis, Garnishee

A rule was issued on the Garnishee, November 28, 1908, and on December 5, 1908, judgment was rendered against the Garnishee for default, and for refusing to answer interrogatories, in the sum of Thirty Dollars and costs. Held, that the justice was without jurisdiction in rendering judgment by default, the Act of Assembly having provided: "If said Garnishee shall neglect or refuse to answer said interrogatories within eight days, he shall be adjudged to have in his possession property of the defendant, equal in value to the demand of said plaintiff."

JURISDICTION—JUDGMENT TO BE THAT GARNISHEE HAS IN
HIS POSSESSION PROPERTY OF DEFENDANT, ETC.—ACT
OF APRIL 15, 1845, P.L. 460—ATTACHMENT EXECU-
TION—RECORD OF JUSTICE.

No. 540, February Term, 1909, C.P. of Luzerne County.

Certiorari to the proceedings before the Justice of the
Peace, on behalf of the garnishee.

M. H. McAniff, Attorney for Plaintiff.

John S. Lopatto, with him George Ritchie, Attorneys for
Garnishee.

Opinion by G. L. Halsey, J., April 26, 1909.

EXCEPTIONS:

I. The justice was without jurisdiction in that said justice rendered and entered a "default judgment," as appears by his record returned, failing to give or afford the garnishee eight (8) full days to make answer to the interrogatories served on him.

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Yaculoitis, Garnishee.

2. General exception.

OPINION.

It is contended by the garnishee against whom judgment was entered in these proceedings, that the same was prematurely entered. The rule on the garnishee issued on the 28th November, 1908, and judgment was entered as follows:

"Now, December 5, 1908, at 5 p.m., judgment is rendered against Anthony Yaculoitis, garnishee, for being in default and refusing to answer the interrogatories for the whole of the plaintiff's claim in the sum of Thirty Dollars and costs of suit."

The Statute of the 15th April, 1845, P.L. 460, paragraph 4, provides: "If said garnishee shall neglect or refuse to answer said interrogatories within eight days, he shall be adjudged to have in his possession property of the defendant equal in value to the demand of said plaintiff."

By computing the time between the date of the entry of the rule and the date of the entry of the judgment, judgment was entered before the expiration of the time within which the garnishee had a right to make answer. It was, therefore, prematurely entered, and was entered at a time when the magistrate was without jurisdiction to so enter it. The form of the judgment is not in the words of the Act of Assembly (*supra*) that the garnishee shall be adjudged to have in his possession property of the defendant equal in value to the demand of the said plaintiff. There is no such finding in the judgment, the

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judgment rendered being that the garnishee, refusing to answer the interrogatories, was in default for the whole of the plaintiff's claim in the sum of Thirty Dollars and costs of suit. There is no judgment that the garnishee has in his possession property of the defendant equal in value to the demand of the plaintiff.

Exceptions sustained.

Reported by G. Fred. Lazarus, Wilkes-Barre, Pa.

Borough of Derry v. W. H. Wilburn

An action was brought before a Justice of the Peace "for penalty for violating Borough Ordinance No. 48, by hauling coal and selling the same without weighing, debt being five dollars (\$5.00) penalty for violating Borough Ordinance No. 48, by selling and delivering coal without weighing, contrary to ordinance enacted by the town council, made February 8th, 1901," and the justice rendered judgment as follows: "And now, December 29th, 1908, the defendant is by the justice found guilty of the offence charged as aforesaid, and convicted thereof, and adjudged, for the same offence, to pay a penalty of five dollars—and now judgment is rendered in favor of plaintiff for the said sum of \$5.00 and costs of suit." Held, that every record of a conviction or judgment, against a defendant, for the violation of an ordinance, must show that the magistrate had jurisdiction of the subject matter of the suit, the ordinance or section thereof violated must be specified, and where the record fails to set out the ordinance or section thereof on which the action is based, on certiorari, the Court will reverse the judgment.

It must appear that the offence was committed within the limits of the municipality.

**BOROUGH ORDINANCES—JURISDICTION, J. P.—SUMMARY
CONVICTIONS—CERTIORARI.**

No. 867, February Term, 1909, C.P. of Westmoreland Co.
Certiorari.

Warner Utts, Attorney for Plaintiff.

Wm. S. Rial, Attorney for Defendant.

Opinion by A. D. McConnell, J., March 17, 1909.

COPY OF JUSTICE'S REPORT AS FILED.

December 15th, 1908, summons
issued W. H. Brown, Cons., for penalty
for violating Borough Ordinance No.
48, by hauling coal and selling the same

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Borough of Derry

v.

W. H. Wilburn

Justice's Costs:

Summons	.25
Docket entry . .	.25
Constable's re- turn	.25
Hearing and judgment . . .	.50
Three oaths . . .	.30
Transcript . . .	.50

Constable's Costs:

Service	.50
Mileage	.6

without weighing. Returnable December 21st, 1908, at from 9 to 10 o'clock a. m. Returned on oath. Served December 15th, 1908, on defendant, personally, by producing the original summons and informing him of the contents thereof, and by leaving him a true copy.

Now, December 21st, 1908, defendant being sick, sent his son, who, being sworn, deposes and says W. H. Wilburn being in bed and not able to appear case continued until deft. is able to appear.

Now December 29th, 1908, defendant appears; Warner Utts appears for Borough of Derry. W. S. Rial appears for defendant. Debt being five dollars (\$5.00) penalty for violating Borough Ordinance No. 48 by selling and delivering coal without weighing, contrary to an ordinance enacted by the town council made February 8th, 1901. VINCE VITALE sworn for Borough of Derry. Warner Utts sworn for Derry Borough, defendant not offering any evidence. After hearing parties, their proofs and allegations, judgment rendered, and now, Dec. 29th, 1908, the defendant is by the justice found guilty of the offence charged as aforesaid and convicted thereof, and adjudged for the same offence to pay a penalty of five dollars. And now judgment is rendered in favor of plaintiff for the said sum of \$5.00 and costs of suit.

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County of Westmoreland, ss:

I certify that the above is a correct transcript of the proceedings had before me in above suit, and of record on my docket.

Witness my hand and seal at Derry, this 6th day of January, A.D. 1909.

J. F. AMEND, (Justice Seal.)
Justice of the Peace.

My Commission Expires May 6, 1912.
Derry, Westmoreland Co., Pa.

In the Court of Common Pleas of Westmoreland County,
Pennsylvania:

Defendant, by his counsel, appeals and assigns for error.

First. The record does not set out the ordinance in the manner required by law.

Second. The record does not show what evidence was produced which would show or tend to show the violation of any ordinance of the appellee by the appellant.

Third. It does not appear from the record that the defendant's act out of which the suit arises had occurred since or before the passage of the ordinance.

Fourth. The record fails to set out sufficient facts upon the record to enable the Court to determine whether the justice has jurisdiction.

Fifth. The record fails to show that judgment was publicly given.

Sixth. The justice acted unfairly and unjustly in rendering judgment entirely on evidence not admissible

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in any judicial inquiry as will appear by the annexed affidavit attached hereto and made a part of this exception.

Wm. S. Rial,
Attorney for Appellant.

OPINION.

The action before the justice in this case was commenced by summons, and (as the record discloses) was "for penalty for violating Borough Ordinance No. 48, by hauling coal and selling the same without weighing" * * * * "debt being five dollars (\$5.00) penalty for violating Borough Ordinance No. 48, by selling and delivering coal without weighing, contrary to an ordinance enacted by the town council, made February 8th, 1901."

The judgment entered by the justice on the suit on the subject-matter, as stated above, is in words as follows: "Judgment rendered: And now, Dec. 29th, 1908, the defendant is by the justice found guilty of the offence charged as aforesaid, and convicted thereof, and adjudged, for the same offence, to pay a penalty of five dollars—and now judgment is rendered in favor of plaintiff for the said sum of \$5.00 and costs of suit."

The cause of action, in so far as it is expressed at all, is wholly expressed by the terms quoted above from the justice's transcript.

There is given no copy of the borough ordinance alleged to have been violated, so that it might serve the function of supplementing the terms employed to state the cause of action. We can have no further or other knowledge of the scope of the violated ordinance than that

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which is communicated to us by the extracts above quoted. The specifications of error present for solution the question of whether such a record will withstand the inspection invoked by the writ of certiorari.

With reference to the borough's authority to pass ordinances, we know from the second section of the general borough Act of April 3d, 1851, P.L. 320, that "the powers of the corporation shall be vested in the corporate officers designated in the charter, they shall have power" * * * * "to make all needful regulations respecting markets and market days, the hawking and peddling of market produce and other articles in the borough, and for the inspection and measurement or weight of cordwood, hay, coal and other articles *sold or offered for sale in the borough.*"

It is not to be doubted, therefore, that an ordinance predicated on the foregoing statutory power authorizing the making of it, and no more extensive in its prescribed field of operation than that defined by the Act itself would be a valid ordinance which might be enforced through the medium of a prescribed penalty. We see, however, that the field of operation, as fixed by the statute, is to "coal and other articles sold or offered for sale in the borough"—a limitation not manifested in any way by the proceedings in this case. There is no hint in this record that Ordinance No. 48 is confined in its operation to "coal and other articles sold or offered for sale in the borough," but, on the contrary, the mode of violation for the ordinance, as the record discloses, is "by hauling coal and selling the same without weighing," or, as it is expressed later in the record, is "by selling and delivering coal without weighing, contrary to an ordinance

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enacted by the town council, made February 8th, 1901." The territorial limits of the borough cut no figure in defining the offence which the ordinance of this record describes. If there is an ordinance in terms so comprehensive as to subject one to a penalty for hauling coal, selling coal, or delivering coal, without weighing it, with no respect to the territorial limits within which these acts are performed, then such an ordinance would transcend the prescribed limitations of the statutory warrant for its making, for the statute refers only to coal and other articles sold or offered for sale in the borough, as being an appropriate subject of municipal regulation.

There was obviously no thought in the mind of the law-maker in formulating the Borough Act of 1851 that a borough, pursuant to this provision, could enact an obligatory ordinance, requiring the weighing of coal not sold in the borough, or one requiring a man who merely hauled through the borough without selling it therein, to have it weighed in the borough, and least of all did the law-maker intend that the borough, regardless of its own territorial limits, would undertake to subject people generally to the penalties of an ordinance exacting the weighing of coal which they were engaged in hauling for themselves or others. According to the intent of the statute, the authority of the borough is confined to a regulation of transactions within its own territorial limits, and what constitutes the transactions is the selling or offering for sale in the borough of coal or other articles, without the statute's placing any importance on the act of hauling or delivering at all; in fact, hauling and delivering are not mentioned in the statute at all.

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Yet, from an inspection of this record, we would be justified in concluding that the penalty imposed by the alleged ordinance was attached to an ordinance not confined in the scope of its operation to coal sold or offered for sale within the borough. There is nothing in the record to show that the subject-matter of this suit, (regardless of any inferred terms of the ordinance), was in fact for any sale made within the territorial limits of the borough, but, for aught that appears, the hauling, selling and delivery which occasioned the imposition of the fine took place clear outside of the borough limits.

"It must appear that the offence was committed within the limits of the municipality."

Savidge on Boroughs in Pa., 129.

Mayor v. Nell, 3 Yeates, 475.

In the case of *The Mayor v. Mason*, 4 Dallas, 266, there was an alleged violation of an ordinance against huckstering. The Court, in a case of certiorari to the record of the magistrate, said: "In the next place, we have no statement where the defendant carried on the business of huckster, and it might be where it was no offence to do so, or where the corporation had no jurisdiction to punish it as an offence. The proceedings are, therefore, manifestly erroneous and must be set aside."

In the case of *The City v. Duncan*, 4 Phila., 147, Judge Allison, *inter alia*, said:

"Every record of a conviction or judgment against a defendant for the violation of an ordinance, must show that the magistrate had jurisdiction of the subject-matter of the suit; the section of the ordinances violated must be specified; the penalty imposed must conform to the fine, being neither greater nor less in amount; that evidence was

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adduced in support of the charge, or that the defendant confessed the same; that witnesses were either sworn or affirmed; that the offence was committed within the city or borough enacting the ordinance, and that judgment was duly entered against the defendant. This suit was instituted to recover a fine of \$20.00 imposed under the 4th section of the ordinance of April 14th, 1859, for selling meat in South street, the same not being the produce of the defendant's own farm. The alderman does not find that the offence was committed within the limits of the city of Philadelphia; for this reason the judgment must be reversed."

In this case, there is nothing to show that any offence was committed within the limits of the borough of Derry—or that the offence which the justice finds was committed by the defendant was committed by him at any place which gave the borough of Derry any legal right to punish the offence by the imposition of a fine.

In addition to these defects, the failure to quote the ordinance violated is a fatal defect. "The record must show the terms of the ordinance—a reference to the title, section or date merely, being insufficient."

Savidge, *Law of Boroughs in Pa.*, 128.

Numerous cases are cited by the author to sustain the doctrine of the text. "Where in a suit for penalty under borough ordinance, the justice's record fails to set out the ordinance on which the action is based, on certiorari, the Court will reverse the judgment."

Smith v. Pierce, 10 Kulp, 422.

In *Flood v. Borough of Ashley*, 5 Kulp, 462, Judge Rice says: "The record does not contain the ordinance or section thereof alleged to have been violated. This is

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a fatal defect. It is true there is attached to the papers sent up with the writ what purports to be a copy of an ordinance, but it is not made a part of the record, nor is it otherwise identified. In suits to recover penalties for violation of borough ordinances, it is of the first importance that the offence should be plainly described and that the ordinance should be set forth in order that the reviewing court may determine whether the Act complained of was in violation of the ordinance."

The justice, in this case, finds the defendant "guilty of the offence charged as aforesaid," but, looking at the manner in which the offence is charged in the record, it is not possible to know what that offence is, unless the words there given, descriptive of the subject-matter of the suit, are supplemented by the express terms of the ordinance itself, or, if it be thought possible to infer the terms of the ordinance from what is stated in the record, then an ordinance with such terms is beyond the power of the borough to enact, and is, therefore, a nullity. The borough has no authority to enact an ordinance denouncing a penalty against peoples generally, for simply not weighing coal which they may haul or sell. It has the right to regulate sales within the borough, and to enforce the regulation by fine, and it should appear from the record that only this was done. The ordinance should be given in the record, and the act done by the defendant should be so explicitly defined in the record that, when we lay it down by the quoted ordinance, we can see wherein the act is variant from the terms of the ordinance, for the jurisdiction to adjudicate a question of the violation of an ordinance depends on a defining of the subject-matter of the suit with no less precision than this. Suits of this

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kind are civil actions and not summary convictions, but they are, nevertheless, modes of inflicting penalties, and the jurisdiction to impose such penalties must be fully manifested by the record. This jurisdiction is not manifested by this record, and, for the reason above given, the proceedings are reversed.

Attest:—Harry N. Yont, Prothonotary.

Reported by Marker & Hollingsworth, Greensburg, Pa.

Commonwealth of Pennsylvania, ex rel.
Henry Koepke v. Elmer Eades

Where the affidavit upon which the writ of certiorari was issued was not taken before a Judge of the Court of Common Pleas, or before the Prothonotary, or before the Alderman before whom the case in which the writ of certiorari was taken, was pending, and as required and provided for by the Act of Assembly, the writ will be quashed.

CERTIORARI—MOTION TO QUASH CERTIORARI—JUSTICE OF
THE PEACE—FILING RECORD—NEGLECT OF J.P. TO
FILE HIS RECORD—RETURN TO WRIT OF CERTIORARI.

No. 185, September Term, 1908, C.P. of Erie County.

L. B. Jones and L. E. Torrey, Esqs., for Plaintiff.

Clark Olds, Esq., for Defendant.

Opinion by E. A. Walling, P.J., Dec. 7, 1908.

OPINION.

The affidavit of Elmer Eades, upon which the certiorari was founded, was sworn to by him before a Justice of the Peace.

The Alderman to whom the writ was directed, neglected to file or make a return to the writ.

The motion to quash was based upon the reason "That the affidavit upon which the above writ of certiorari was issued was not taken before a Judge of the Court of Common Pleas, or before the Prothonotary, or before John Scheer, the Alderman before whom the case in which the above writ of certiorari was taken, was pending, and as required and provided for by the Act of Assembly."

Commonwealth of Pennsylvania, ex rel. Henry Koepke
v. Elmer Eades.

Additional reasons for quashing were filed: "That the record from the Justice of the Peace to return which certiorari was issued in above stated case, has never been filed or returned."

From the Record:

August 19, 1908, Certiorari to John S. Scheer, Alderman of the Second Ward of the City of Erie, Returnable First Monday in September, 1908. Bond of Elmer Eades with surety filed. Affidavit of Elmer Eades filed. Served this Certiorari upon the within-named John S. Scheer, Esquire, Alderman of the Second Ward of the City of Erie, in the County of Erie, on the 20th day of August, 1908, by handing him the original writ of which this is a true and attested copy, and making known contents thereof to him personally. So answers Henry Cogswell, Sheriff.

Sept. 10, 1908. Exceptions of the defendant filed.

Sept. 14, 1908. Messrs. L. B. Jones and L. E. Torrey appear for the plaintiff.

Sept. 14, 1908. On motion to Quash Certiorari, "Rule to Show Cause" granted, Per Curiam.

On Argument Lists.

Order:

"And now, Dec. 7, 1908, no record having been returned, the Rule to Quash the Writ of Certiorari in above-stated case is made absolute. Per Curiam."

Reported by J. E. Reed, Esq., Erie, Pa.

Prague Flouring Mills Company v. E. D. Fry
and Paul Fry, Trading as Fry
Milling Company

Where defendant in a judgment before a Justice, through his counsel, asked for a transcript of appeal, had the necessary affidavit and the recognizance signed and acknowledged, and offered to pay the costs, but was informed by the Justice that the costs had not been counted up and he would have to pay them later, and upon several occasions counsel visited the office of the Justice during business hours, but was not able to find him; on the last day for completing the appeal, the justice having called the attention of counsel for defendant that the costs had not been paid; and the amount of the costs being in dispute and the twenty days having expired without payment of the costs,—

Held, that counsel having done everything which it was possible for him to do at the time when he was entitled to complete his appeal and was prevented by reason of the fact that the Justice did not have the costs calculated, and counsel having made the efforts he did, the Court in its discretion has the power to grant an appeal, nunc pro tunc.

APPEAL, NUNC PRO TUNC—PAYMENT OF COSTS—FAILURE
OF JUSTICE TO CALCULATE COSTS.

No. 475 June Term, 1909, C.P. of Cambria County.

Rule to show cause why appeal should not be allowed
Nunc Pro Tunc.

P. N. Schettig, Esq., for Rule.

S. L. Reed, Esq., Contra.

Opinion by O'Connor, J., May 25, 1909.

OPINION.

On April 1, 1909, the date fixed for the hearing before Justice Evans, in the above-stated cause, the parties appeared, and, after hearing, judgment was rendered in

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Trading as Fry Milling Company.

favor of the plaintiff in the sum of two hundred and fifty-eight dollars and fifty-eight cents, the full amount of plaintiff's claim.

After judgment had been rendered, defendant's counsel asked for a transcript of appeal, had the necessary affidavit executed and the necessary recognizance signed and acknowledged by his clients and the security, and then and there offered to pay the amount of the costs, and thus complete his appeal; but the Justice informed him that the costs had not been counted up, and he would have to pay them later. Upon several subsequent occasions the counsel for the defendant visited the office of the magistrate during business hours, and was not able to find him in. On the last day for completing the appeal, the justice, with a transcript in his pocket, called the attention of the counsel for defendant to the fact that the costs had not yet been paid. The amount of the costs was somewhat in dispute, and the twenty days finally expired without said costs being paid. Almost immediately application was made to this Court for leave to complete the appeal nunc pro tunc.

Upon the above statement of facts should such an appeal be granted? Had no action been taken other than mere notice of intention to take an appeal, the Court would have no difficulty in disposing of this matter, but where counsel did everything which it was possible for him to do at the time when he was entitled to complete his appeal and was prevented by reason of the fact that the justice did not have the costs calculated, and did not then and there make a calculation of the costs, largely shifts the burden from the shoulders of the would-be appel-

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lant, and when, upon several occasions, counsel for defendant made an effort to pay the costs and was prevented through no fault of his own, we can not say that due diligence was not used. We believe that the Court, in its discretion, has the power to grant an appeal nunc pro tunc under the disputed facts as they appear of record in this case, and in the exercise of that discretion, we believe this Court ought to grant this appeal.

And now, May 25, 1909, rule heretofore granted is made absolute, and defendant is allowed to perfect his appeal nunc pro tunc by the payment of costs on or before June 5, 1909, whereupon the Justice, Oliver Evans, Esq., is directed to issue proper transcript of appeal to be filed in this Court not later than June 7, 1909; costs to abide event of suit.

Reported by S. L. Reed, Evansburg, Pa.

Antreason v. Samarsien

The Act of April 10, 1905, P. L. 134, providing for the attachment of wages for boarding or lodging, is in conflict with art. iii, sec. 7, of the constitution, which forbids special legislation changing the methods for the collection of debts.

WAGES—ATTACHMENT FOR BOARD—ACT OF APRIL 10,
1905, ART. III., SECT. 7, CONSTITUTION.

No. 3858, December Term, 1908, C.P. No. 1, Phila. Co.

Rule to Dissolve Attachment.

H. Roberts, for Plaintiff.

Sellers & Rhoads, for Garnishee.

OPINION.

Appeal from the judgment of a magistrate in a suit by the proprietor of a boarding-house to recover four weeks' board, begun, under the Act of April 10, 1905, P. L. 134, by summons and attachment against defendant's wages in the hands of his employer, the Pennsylvania Railroad Company. Defendant petitioned the Court to dissolve the attachment, alleging the unconstitutionality of the Act of 1905.

The Act of 1905 violates art. iii, section 7, of the constitution, which forbids special legislation "changing methods for the collection of debts or the enforcing of judgments."—*Vulcanite Portland Cement Co. v. Allison*, 220 Pa., 382; *Vulcanite Paving Co. v. Philadelphia Rapid Transit Co.*, 220 Pa., 603; *Tennessee Producers' Marble Co. v. Grant*, 14 Dist. R. 453.

Antreason v. Samarsien.

Per Curiam, March 5, 1909.—Rule absolute, on authority of *Vulcanite Portland Cement Co. v. Allison*, 220 Pa., 382.

From Lackawanna Jurist, Scranton, Pa.

Commonwealth, ex. rel. George H. Beecher,
v. Harry M. Ould, Constable

A warrant issued by a Justice of the Peace is fatally defective, which shows that it was issued prior to the date on which the offence as charged was committed.

DEFECTIVE WARRANT OF A JUSTICE

No. 71, November Term, 1908, C.P. of Berks County.

Petition for a Writ of Habeas Corpus.

Cyrus G. Derr and Walter B. Freed, for Relator.

Opinion by Stevens, J., November 21, 1908.

OPINION.

At the hearing it appeared that a warrant was issued by a Justice of the Peace of York County, against the relator, George H. Beecher, of Reading, Berks County, Pennsylvania, for driving his automobile at an excessive speed on the public highways of York County. The warrant on its face showed that it was issued by the Justice of the Peace on the 2d day of October, A.D. 1908, and that the offence charged was committed on the 31st day of October, 1908.

The attorneys for the relator contended that the warrant was fatally defective because it was issued before the offence was committed.

Relator discharged.

Reported by Lentz & Moyer, Reading, Pa.

Rogers Co. v. Sapovits

When a case is continued by a Justice of the Peace subject to call and one of the parties afterward has appointed a time for a hearing, the adverse party must have actual notice. Service of notice of the meeting on an adult member of his family is not sufficient.

One who petitions the Court for leave to appeal nunc pro tunc from a judgment of a Justice of the Peace must show a prima facie defense on the merits or the appeal will not be allowed.

JUSTICE OF THE PEACE—CONTINUANCE OF HEARING—
CONTINUANCE SUBJECT TO CALL—SUFFICIENCY OF
NOTICE OF HEARING—APPEAL NUNC PRO TUNC—
WHEN APPEAL NOT ALLOWED.

No. 322, December Term, 1908, C.P. of Delaware Co.

Petition by defendant for leave to appeal nunc pro tunc
from a judgment of a Justice of the Peace.

John E. McDonough for Petitioner.

A. A. Cochran, Contra.

Opinion by Broomall, J., January 30, 1909.

OPINION.

On September 1, 1908, the plaintiff procured to be issued by an alderman of Chester a summons to recover a debt of twenty-one dollars and fourteen cents, alleged to be owing on contract. The summons was returnable September 8, 1908. It was duly served upon the defendant. The issuing and service of this summons led to an interview between the defendant and the attorney of the plaintiff, in which the defendant contended that he had paid the claim. In

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order to afford time to the plaintiff's attorney to make inquiries respecting the allegation of the defendant, the case was not heard by the alderman on September 8, 1908, but at the instance of the parties it was continued, "subject to call." The position of the case at this point is that either party could start the litigation going by procuring the alderman to fix a day and hour for the adjourned hearing and by giving notice of the appointed time to the other party. This, of course, means actual notice. There is no legal provision for a constructive notice by service at the residence of the party upon an adult member of his family. It appears that the plaintiff procured an adjourned hearing to be appointed by the alderman for October 16, 1908, at 10 o'clock a.m. It appears that notice of this hearing was served on October 12, 1908, on the wife of the defendant at his residence. The defendant testifies that he never received this notice.

On Oct. 16, 1908, the case was heard by the alderman and a judgment was rendered in favor of the plaintiff and against the defendant for the amount of the claim, twenty-one dollars and fourteen cents, with interest and costs, making the amount of the judgment twenty-two dollars and sixty-nine cents. According to the testimony of the defendant, he never had notice of the time appointed for the adjourned hearing and did not have knowledge of the rendition of the judgment until it was too late for an appeal. He then applied to the alderman to permit him to appeal. This was refused. It appears that on the day appointed for the adjourned hearing, and prior to 10 o'clock a.m., the alderman met the defendant by chance on the street and had a conversation with him respecting the proceeding in which, according to the testimony of

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the alderman, he told the defendant that the plaintiff had called the proceeding to go forward. Upon repeating this the alderman testified that he had told the defendant that the plaintiff had called the proceeding to go forward, and that it was about to take place in a few minutes. Upon repeating this again, he said that he told the defendant that the plaintiff had called the proceeding to go on, but in the last statement he did not say anything about the hearing taking place in a few minutes or any other time. The burden of showing actual notice of the appointed time for the adjourned hearing being upon the plaintiff, it is manifest that under this unsatisfactory state of the evidence upon this point, the plaintiff's contention in respect to it must fail.

If the review of this proceeding were before the Court on a certiorari, it follows that the record of this judgment would have to be quashed. But the defendant has applied to the Court for leave to appeal nunc pro tunc. The logic of such application is not that the judgment is void, but that the judgment is regular and the basis of the application is to enable the defendant to make defense upon the merits of his case. This brings us to a consideration of the merits of his case.

The defendant states in his petition the merits of his case to be that the only purchase which he made from the agent of the plaintiff was a bill of goods purchased on October 25, 1907, amounting to twenty-one dollars and fourteen cents. This is the bill of goods for the collection of which this suit is prosecuted. He further states that no other goods were ever delivered to him by either the plaintiff or its agent. He further states that he paid this

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bill of twenty-one dollars and fourteen cents, less the usual trade discount of ten per cent., by a check on January 6, 1908, for eighteen dollars and nine cents, and the check is produced. It will be noticed that the arithmetic of this allegation does not support his statement. According to his statement, the check should have been nineteen dollars and three cents. The defendant produces the bill for these goods by which it appears that he was only entitled to discount upon payment within thirty days. After the expiration of the thirty days, the amount owing was twenty-one dollars and fourteen cents. However, if the defendant paid and the plaintiff accepted eighteen dollars and nine cents in payment of the bill sued on of twenty-one dollars and fourteen cents, this would constitute a meritorious defense. But it appears that on October 25, 1907, the defendant purchased from the agent of the plaintiff another bill of goods amounting to eighteen dollars and forty-six cents, subject to a discount of two per cent., which makes eighteen dollars and nine cents, being the exact amount of the check produced. The purchase of this other bills of goods is not now denied by the defendant, but he claims to have some defense against it. It, therefore, comes to this that the defendant has paid to the plaintiffs a bill of goods against which he now claims to have a defense and that he has no defense against the bill of goods now sued for. It is to be observed that the petition of the defendant is not fully ingenuous to say the least, wherein he avers that he never purchased from the plaintiff more than one bill of goods, to-wit, a bill of twenty-one dollars and fourteen cents and that this bill was paid by his check of eighteen dollars and nine cents.

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By the showing of proofs, it appears that not only does the defendant not show a prima facie defense on the merits, but on the contrary we are satisfied that in reality he has no defense. He, therefore, fails in his contention to show a meritorious defense. It would not be a kindness to him to permit him to litigate a question as to which he must fail, and it would be a positive wrong to the plaintiff to permit him to further delay the collection of its claim.

Reported by H. J. Makiver, Media, Pa.

In Re: Contested Election of Thomas F. Grady,
School Director of Fell Township

In all cases of contested elections, the Act of Assembly requires that the petition must be supplemented by a bond which must be filed within ten days in order to be effective.

Where, in such cases, a bond, as required by Act of Assembly, is not filed in due time, the court on petition has no power or jurisdiction to order such bond to be filed "nunc pro tunc."

Where an Act of Assembly gives authority to court to proceed, or where the manner of obtaining jurisdiction over any matter is prescribed thereby, the court has no discretion. The statute is then mandatory and must be complied with.

CONTESTED ELECTION—TIME TO FILE BOND—CONSTRUCTION OF STATUTE.

Q. S. of Lackawanna County.

Messrs. Brennan and Reedy, for Relator.

Messrs. Zimmerman and Lowry, for Respondent.

Opinion by Edwards, P.J., April , 1909.

OPINION.

The petition to contest the election in this case was filed March 17, 1909. We find that the Act of 1899, P.L. 118, provides, inter alia, that whenever a petition is presented to the Court to contest an election in such a case as the one now before us, it shall be the duty of the petitioners, within ten days thereafter, to file a bond for costs, and if said bond is not filed as provided in the Act, that the petition to contest the election shall be dismissed. In the present case there is no bond filed yet. A motion is now made to fix the amount of the bond and to allow it to be filed as of the 27th of March, 1909. We have no

In Re: Contested Election of Thomas F. Grady, School
Director of Fell Township.

power to make a nunc pro tunc order. The filing of the bond within ten days from the presentation of the petition is a condition precedent to the jurisdiction of the Court. Where authority to proceed in courts of justice is conferred by statute, or where the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding is mandatory, and must be complied with, or the proceeding will be entirely void.

The question before us has been discussed and decided in a well considered opinion by former judge, now Justice P. J. Stewart, in the case of Southampton Township Election, 12 D. R., 141.

The motion to fix the amount of the bond and for leave to file the same is refused and the petition to contest the election in this case is dismissed at the cost of the petitioners.

Reported by Wm. A. Wilcox, Scranton, Pa.

Glyndeur Hickman v. John E. Harbster

Where a transcript from the docket of a Justice of the Peace shows the cause of action to be trespass on the case, the Justice is without jurisdiction, and judgment for plaintiff will be reversed on certiorari.

JURISDICTION OF JUSTICE.

No. 51, September Term, 1908, C.P. of Berks County.

Certiorari.

Joseph R. Dickinson, Esq., for Defendant and Certiorari.

Opinion by Endlich, P.J., October 5, 1908.

OPINION.

The action was brought before Francis Clemson, Alderman, on August 8, 1908, and at the hearing the following evidence was adduced for plaintiff, as appears by the transcript filed:

"Now, Aug. 14, 1908. Plaintiff appears, is sworn, claims \$24.27 as damages of a motor cycle, and \$8.00 as loss of wages or income for four successive days (the said motor cycle being used daily on street in delivering packages and goods for stores), and loss of cycle meter, broke, \$1.00. This was from the coachman or driver of defendant's family, he running into motor cycle July 3, 1908, as it was standing on curb line in front of plaintiff's office, 35 South Fifth street."

The defendant did not appear, and judgment was entered for plaintiff for \$33.27 and costs of suit.

The defendant, inter alia, filed the following exception:

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"2. The action is to recover damages caused by 'the coachman or driver' of defendant's family, for which an action on the case only would lie and an Alderman or Justice of the Peace has no jurisdiction in suits to recover damages in an action of trespass on the case."

Judgment reversed.

Reported by Lentz & Moyer, Reading, Pa.

Engle v. Shellhammer

When parties to a lease enter into a contract for the sale of the leased premises, the relation of landlord and tenant ceases and the former landlord cannot maintain proceedings before a justice of the peace under the landlord and tenant act to get possession of the premises.

The justice not having jurisdiction, the Common Pleas has none on appeal. If the Common Pleas has no jurisdiction to oust the defendant from possession, it has none to reinstate him if ousted by any process issued in the case.

LANDLORD AND TENANT—AGREEMENT OF SALE—JURISDICTION—POSSESSION.

Rule for Possession. No. 167, March Term, 1907, C.P. of Schuylkill County.

R. P. Swank and G. M. Roads, for Plaintiff.

J. W. Moyer, for Defendant.

Opinion by Marr, J., March 2, 1908.

OPINION.

This referred to case came into Court on an appeal from a justice of the peace who had given judgment in favor of the plaintiff and against the defendant for the possession of certain premises referred to in a certain lease between the respective parties and in pursuance of which judgment the defendant was evicted from the premises. At the trial in Court the defendant claimed that the lease had been terminated by the parties and a contract of sale entered into which terminated the relation of landlord and tenant between the parties, and therefore the justice, who had proceeded under the landlord and tenant act for possession had no juris-

Engle v. Shellhammer.

diction of the case and therefore the Court on an appeal had no jurisdiction, which contention of the defendant was sustained by the Court, and a verdict was entered in favor of the defendant. Since sustaining the contention of the defendant, that the Court had no jurisdiction of the case and therefore directed a verdict for the defendant, he now comes into Court and asks it to take jurisdiction for the purpose of reinstating him in the possession of the disputed premises. Can this be successfully accomplished? Can the Court have no jurisdiction of the case for the purpose of maintaining the suit of the plaintiff, and yet have jurisdiction for the purpose of reinstating the defendant's possession? Our attention has been drawn to no case supporting such contradictory positions and we are aware of none. We think the defendant must enforce his rights in another manner.

And now, March 2, 1908, the rule for possession as prayed for is herewith refused.

Reported by A. W. Schalck, Pottsville, Pa.

David Neuser's Estate

The very best means of ascertaining the value of lawyers' services are the opinion of those who, in earning and receiving compensation for themselves, have learned what legal services are worth.

VALUE OF LEGAL SERVICES—FEES OF ATTORNEYS.

No. 13, May Term, 1908, Orphans Court, Schuylkill Co.
Audit of Executor's Account.

S. M. Enterline, M. H. Moyer and R. S. Bashore, for
Claimant.

E. D. Smith, for the Estate.

Opinion by Wilhelm, P.J., Jan. 4, 1909.

OPINION.

From the evidence, we find the following facts:

1. David Neuser died on the 2d day of October, 1905, testate, and letters testamentary were issued to A. D. Wilcox on the 6th day of October following. No account was filed by the executor, and on the 16th day of December, 1907, on the petition of R. S. Bashore, a citation was issued, directed to the executor, commanding him to show cause why an account should not be filed. On the 9th day of March, 1908, the executor filed an account showing that he had received from proceeds of the estate the sum of \$47,200.78, and that he had paid out in legacies and otherwise the sum of \$6470.20, and had distributed to the heirs the sum of \$40,720.58, and that there was no balance remaining in the hands of the executor.

This account came before the Court for audit June 15, 1908. It appears there are no debts of the decedent

David Neuser's Estate.

remaining unpaid, except the claim of R. S. Bashore, Esq., for professional services to the estate, and the testimony taken was confined to this claim, amounting to \$1090, on which a credit is acknowledged of \$90.60.

That the claimant was employed generally to guide the executor in the settlement of the estate immediately after the death of the decedent is not disputed, and in pursuance of that employment, the claimant entered upon his duties by reading the will in the presence of the legatees. The will directed the executor to appraise all of the property, real, personal and mixed, immediately after the death of the testator. The inventory and appraisement shows that the household goods amounted to about \$200.00, and the balance of the estate, consisting of money in banks, bank stock, mortgages (seven in number), judgment notes, shares of stock in several corporations and twelve pieces of real estate, amounted to over \$39,000.

The executor contends that the claim of R. S. Bashore is excessive because the settlement of this estate was a simple matter. Viewed in retrospect, the settlement of most estates is a simple matter, if litigation does not arise. Considering the settlement of this estate in a general way, keeping in view the amount involved, the provisions of the will and the character of the items embraced in the inventory and appraisement, we are not prepared to say the settlement of this estate was a simple matter. It is true, there was no litigation, but that may be due, and probably was due, to the sound advice, skill and experience of the lawyer who guided this administration.

Passing from a general view of the case in gross, we come to the consideration of it from the testimony. We find the attorney carefully explained the provisions of the

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will and advised as to the manner in which the will of the testator should be carried out; attended to the appraisement of the estate; the probate of the will, and went over all the papers of the decedent; that his correspondence with the executor, who lived in Washington, was voluminous and embraced many items of service to which he gave his attention. The services rendered are set out in a statement, which is made a part of the record and covers four pages of single line typewriting. As to each item, Mr. Bashore testified that the services rendered by him were fully worth the amount he charges. He was cross-examined in detail as to many of the items and he recites the acts done as well as the time consumed in rendering the service. No witness contradicts the claimant on any of the items with but one exception. On the other hand, three of the oldest members of the Bar, two of whom at least have had large experience in Orphans' Court practice, testify that they have examined the statement of the claimant which sets out the services rendered and the charges made, and they believe the charge is a reasonable one, and not excessive. The very best means of ascertaining the value of a lawyer's services are the opinion of those who, in earning and receiving compensation for them, have learned what legal services in these various grades are worth.

It is true no two cases of service are identical, and the amount of labor required in one case will never be precisely the same that may be required in any other. But professional employment in one case cannot be essentially different from professional employment in another case of like character. Therefore, the best means of ascertaining the value of the services of the claimant was the

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opinion of lawyers who have had experience in this class of practice.

In the absence of any testimony contradicting the claimant, and his witnesses as to the value of the service rendered, the Court is asked to disallow the charge on some of the items because the charge is out of proportion to the amount involved.

We decline to do this, preferring to be guided by the evidence. It was within the power of the executor to produce expert testimony to contradict the claimant and his witnesses, if the charges are unreasonable. In one instance it was testified that associate counsel was employed in the case, who could have been subpoenaed by the executor to ascertain the value of the service in that instance. None of these things were done in defense of this claim, and we are disposed to allow it in full, with one exception.

The item of \$200.00 for services rendered in P. J. Gaughan matter cannot be allowed, because the claimant has stated \$50.00 of this amount is charged to services rendered to testator, and a receipt shows that all services rendered to testator had been paid in full. Therefore, the claimant will only be allowed \$150.00 on this item, reducing his claim against the estate to \$949.40, which is allowed.

There shall be deducted from the amount for distribution, (\$40,720.58), as shown by the account the sum of \$948.40, which is to be paid to R. S. Bashore, Esq., which would amend the Distribution Statement attached to the account.

Reported by A. W. Schalck, Pottsville, Pa.

Charles A. Judge v. H. W. Johnson

Reasonable certainty is all that can be expected or required of an alderman in the statement of a claim. Technical precision is not required.

CERTIORARI.

No. 41, September Term, 1908, C.P. Lackawanna Co.

R. J. Manning, Esq., for Plaintiff.

Vosburg & Dawson, Esqs., for Defendant.

Opinion by Newcomb, A.L.J., January 4, 1909.

OPINION.

The amount involved here is only \$5.30, but the question raised is not entirely without interest. The action is assumpsit, and is founded upon the covenants in a lease between the parties under which defendant was tenant to the plaintiff for a term expiring March 31, 1908. The demised premises was a dwelling house. As stated in the record, the plaintiff's claim consists of two items, viz., "\$2.80 due him from the defendant for rent and \$2.50 due him from defendant for damages done to two windows by the defendant under the provisions of a written lease in which the plaintiff is lessor and the defendant is lessee, dated April 1, 1907," etc., etc., setting out the material covenants.. The one on which the case turns is that lessee will "leave the premises at the end of the term in as good condition as found except ordinary wear and tear, fire, wind, flood and unavoidable casualties."

Suit was brought soon after the term expired.

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It is objected that the attempt was to combine assumpsit for the rent with trespass for damages sounding purely in tort.

If anything like technical precision were required of an alderman in the statement of the claim the objection might not be unwarranted. Reasonable certainty is all that can be expected or required. The fair intendment of the claim for damages as stated on his record is that it was not for a tortious injury to some uncertain property, but for injury arising out of defendant's failure to surrender the demised premises in the condition specified in his lease. That would be a breach of his covenant, for which assumpsit would be the appropriate remedy. The measure of damages would be the cost of making such repairs as would restore the property to the condition called for by his contract.—*Darlington v. DeWald*, 194 Pa., 305.

There is nothing here to indicate that any other measure was applied. As both claims arise out of the same contract, they are properly joined.

The judgment is affirmed.

Reported by Wm. A. Wilcox, Scranton, Pa.

George F. Buss v. W. W. Johnson

Reference: When a case is appealed to the Court of Common Pleas on transcript from an Alderman or Justice of the Peace, and is then referred to a Referee by agreement of Counsel for Plaintiff and Defendant, the case is properly triable before the referee without entering a formal technical issue.

In such instance the reference is proper and the case is triable on its merits by the Referee, and it is too late, when report of referee is made, to raise the question of the regularity of the proceedings.

EXCEPTIONS TO REPORT OF REFEREE.

No. 1695, September Term, 1908, C.P. of Lackawanna Co.

Lee P. Stark, Esq., for Plaintiff.

J. E. Sickler, Esq., for Defendant.

Opinion by Newcomb, A.L.J., April 26, 1909.

OPINION.

The only exception pressed at bar goes to the jurisdiction of the referee. It is claimed the reference was erroneous for want of an issue. The case having been referred by agreement of parties in writing, it proceeded to trial on its merits. The regularity of the proceeding wasn't raised until after a decision on the merits adverse to the exceptant. Hence, the objection is untimely and will not now be entertained if there be any escape from it.

The point is that there was no formal plea. The learned counsel, therefore, relies on the statute which authorizes such reference only when the case is at issue. But this case came into Court by appeal from the judgment of an alderman. It was, for that reason, unnecessary to raise an issue by technical pleading. The cause

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was within the operation of our rule that all such cases shall be deemed at issue on the filing of the transcript.— Com. Pl. Rule 143. The power to make such rule is hardly open to question. It doesn't operate to the prejudice of the defendant, for it deprives him of no privilege. He is at liberty to enter such formal plea as he sees fit. The defendant's position with respect to the validity of the reference is untenable, and the exceptions are accordingly dismissed and the report of the referee confirmed.

Reported by Wm. A. Wilcox, Scranton, Pa.

In re Report of Joel Heim, et al.

The Act of June 12, 1905, P.L. 142, does not apply to Schuylkill County.

Township officials cannot pay abutting owners for ground taken within the thirty-three feet allowed for a road although the road was not opened the full width.

Auditors' reports should be prepared according to the provisions of the Acts of Assembly.

ACT OF JUNE 12, 1905, P.L. 142—SUPERVISORS—TOWNSHIP
AUDITORS—AUDITORS' REPORTS—SURCHARGES.

Exceptions to the report of the Auditors of South Manheim Township.

Quarter Sessions Schuylkill County, May, 1907.

J. W. Moyer and George M. Paxson, for Exceptions.

E. W. Beddall and C. E. Berger, Contra.

Opinion by Bechtel, J., Sept. 7, 1908.

OPINION.

In re exceptions to the report of Joel Heim, Percival Henne and F. H. Paxson, auditors of South Manheim Township, auditing the accounts of said township for the year 1906.

The exceptions filed to this report arose as the result of a peculiar combination of circumstances, a review of which will be necessary in order to explain some of the conclusions which we have reached, in relation to some of the exceptions filed.

At the February election, 1905, Augustus N. Brensinger, F. J. Heim and S. S. Rhine were elected super-

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visors of said township, under the Act of 1905, for three years, two years and one year respectively, certificates of election therefor having been duly filed in the proper office.

At the same election, F. J. Heim and J. L. Witmeyer were elected supervisors under the law as it existed prior to the passage of the Act of 1905, and certificates of election were duly issued to them and also filed. On the first Monday in March, the board elected under the Act of 1905, organized, electing F. J. Heim, president; Augustus N. Brensinger, secretary, and Daniel F. Boyer, treasurer. At this meeting a road tax of (.010) ten mills was also levied and (\$1.00) dollar on each taxable. The township was divided into districts and roadmasters elected in accordance with the provisions of the Act of 1905.

At the next meeting, to-wit, March 12th, 1906, S. S. Rhine resigned as supervisor and Decatur Davidson was subsequently appointed by the Court, qualified and took his seat as a member of the board. On May 17th, 1906, a duplicate and warrant were turned over by the board of supervisors to D. F. Boyer, its treasurer. This board of supervisors continued to administer the affairs of the township and held its regular meetings until May, 1906, when this Court, in case of Travis v. Lehigh Coal & Navigation Company, 33 Supr. C., 203, decided that the Act of 1905 did not apply to this county.

Thereupon F. J. Heim withdrew from the board of supervisors, and with J. L. Witmeyer, qualified as supervisor in said township, under their certificates of election, filed as aforesaid, and their bonds having been approved by this Court, divided the township into two districts and

proceeded to administer its affairs in accordance with the law as it stood prior to the passage of the Act of 1905.

The supervisors, acting under the Act of 1905, caused to issue a writ of quo warranto directed to F. J. Heim and A. N. Brensinger, to oust them from the positions which they claimed to hold. This writ was quashed by order of this Court on September 17th, 1906, following a decision which it has already rendered in the Travis case *supra*. 340, May Term, 1906. From this time on, the two supervisors, Brensinger and Davidson, met as required by the Act of 1905, with such of the roadmasters as would meet with them, but transacted no further business, for the reason, as appears from the testimony, that it was impossible to procure any one to do any work for them in the township.

The two supervisors, Heim and Witmeyer, from the first of June, 1906, administered the affairs of the township, repairing the roads, etc., in accordance with law without regard to the Act of 1905. They also levied a road tax of (.008 1-2) eight and one-half mills, the duplicate for which they divided among themselves, according to the different districts over which they had supervision and proceeded to collect or have worked out in accordance with a special Act relating thereto, which they considered in force in said township.

We will now proceed to consider the exceptions to the report, answering them in the order in which they have been set forth in the petition filed.

First. We are asked to surcharge for the reason that the auditors erred in not charging the treasurer with the amount of the tax duplicate, \$2450.18, as levied by the board of supervisors under the Act of 1905. We are

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at a loss to see how they can sustain this exception for the reason that the Sixth Section of the Act of 1905, P.L. 142, provides, *inter alia*: "On the first of November in each year, the treasurer shall make out a list of all delinquent taxpayers with the amount of the road tax levied against each and deliver the same to the township collector, who shall immediately proceed to collect the same and make payment thereof to the treasurer of the board as soon as received, and the collector shall be responsible to the township for the collection of such taxes." It will thus be seen that the township collector is the party who is responsible for the collection, and the evidence in the case shows, without contradiction, that the list as provided for by the Act of 1905 was made out by the township treasurer, Daniel F. Boyer, and delivered by him to the tax collector of the township, one, Alvin Heim, in accordance with the provisions of said act; and the accounts of the said Alvin Heim are not excepted to nor indeed do they appear to have been audited in the statement filed, which is the subject of this exception.

Second. The exception that the auditors' report fails to show the amount of taxes uncollected and certified to the township treasurer, November first, 1906, under Section Sixth of said act, appears to be well taken, but unfortunately for exceptants, there is no evidence before us to show what this amount was.

Third. While it is true the treasurer's account does not show the amount of the duplicate, yet it does show the amount of moneys received on the duplicate, together with the amount received from other sources and the expenditures made by said treasurer, together with the amount due from him to said township, and while the

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auditors' report does not show, in any one item, the amount of the duplicate, still under the two items, one in the account of J. L. Witmeyer and the other in the account of F. J. Heim, "amount of Duplicate," it does show the amount of \$1929.19, which is the full amount of the duplicate levied by the supervisors, acting under the law as it stood prior to the passage of the Act of 1905. We therefore dismiss the foregoing exceptions to the report of the auditors.

As to the exceptions to the report of the auditors, auditing the account of D. F. Boyer, treasurer for the year 1906.

First. For the reason heretofore given, we fail to see that the account of Daniel F. Boyer, treasurer, is entirely without authority of law and in direct violation of the Act of April 1st, 1905, and this exception is herewith dismissed.

Second. The item of \$11.13, which appears to have been paid to A. H. Yeich, in settlement of a damage claim against said township, which had been reduced to judgment before a Justice of the Peace, appears from the evidence to have been paid in good faith and to have been of benefit to the township. Under this state of facts we do not feel that we would be justified in making a surcharge of this amount, and this exception is herewith dismissed.

Third. The item of \$75 paid to F. J. Heim appears, from the evidence, to have been paid to him as a reimbursement for moneys advanced by him to laborers for work done in repairing and making the roads of said township and a list is filed by him, giving the names, dates and

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amounts paid, which go to make up this item. There is no contention that these amounts were not paid, as set forth, nor that the township did not receive value therefor. In view of this evidence, we do not feel justified in making a surcharge of this amount and this exception is herewith dismissed.

Fourth. The item of \$6.00, for three days' service as auditor to Harvey Lukenbill, appears from the evidence before us to be an illegal charge. There is nothing before us to show that the said Harvey Lukenbill was ever elected or served as an auditor of said township, or in fact, to explain this charge, at all. The auditor's report, however, does not show that this amount was ever paid, but simply that it was due. From the evidence before us, we are of the opinion that this amount should not be paid.

Fifth. The items of \$14.00 for Percival Henne and \$14.00 for Joel Heim, for fees as auditors of said township, does not appear from the statement before us and the evidence taken in support of exceptions to have been paid. There is no objection to the payment of these claims in the manner provided by law, but we think this is the only manner in which they should be paid. In view of the fact that the evidence shows that these claims have not been paid, we do not feel justified in making a surcharge and the exception is herewith dismissed.

Sixth. The amount of \$50.00 each, to E. A. Beddall and C. E. Berger, attorney fees, has not been paid, and there is no evidence before us to show what services were rendered by these gentlemen to the Board of Supervisors acting under the old law, nor is there any claim that the charges are exorbitant. Under this state of facts, we do

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not feel justified in making a surcharge and this exception is herewith dismissed.

As to the exceptions of the auditors' report, auditing the account of J. L. Witmeyer, for the year 1906.

First. It is clear from the decision rendered in the case heretofore cited, that the said J. L. Witmeyer was not dejure supervisor at this time, but so far as the evidence discloses, he acted as supervisor by virtue of his election under the law as it stood prior to the Act of 1905, in the light of the division of this Court in the Travis case *supra*, as he understood it. We therefore think that he and his co-supervisor, F. J. Heim, should be treated as defacto officers of said township during the period for which their accounts or statements have been presented and we therefore decline to sustain this exception.

Second. The evidence discloses that the said J. L. Witmeyer furnished supplies to said township to the amount of \$1.25 and that he was allowed a claim for services rendered as supervisor, amounting to \$59.88; these two items, we think, under the provisions of the Act of 1905 were clearly illegal and this exception is herewith sustained, and the said J. L. Witmeyer is hereby surcharged with \$61.13.

Third. The item of \$33.54 appears from the evidence to be 5 per cent. commission allowed the said J. L. Witmeyer, on so much of the duplicate as was given him for collection under the special law heretofore referred to, less expenditures thereon, and this without regard as to whether or not the taxes were worked out or paid to him in cash. This item we are of the opinion is clearly an illegal charge, under the Act of 1905, and this exception

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is herewith sustained and the said J. L. Witmeyer is hereby surcharged with the said amount of \$33.54.

As to the exceptions to the auditors' report for the year 1906, auditing the account of F J. Heim, acting supervisor.

First. We feel that this exception has been fully answered in what was said in answer to the first exception as to the account of J. L. Witmeyer and the exception is herewith dismissed.

Second. The item of \$12.80 the evidence discloses was paid for ground taken for use on the roads of said township, and was taken off the 33 feet on which said highway was originally laid out, although said highway had actually been opened less than that width. We are of the opinion that Jonathan Road, the abutting property owner, to whom this money was paid, had been or should have been fully compensated for his damages sustained by the opening of this road at the time it was originally laid out and therefore should not have received this amount. The supervisors are hereby surcharged with the amount of \$12.80 and this exception is hereby dismissed.

Third. The item of \$43.24 was paid in the same manner and for the same reasons as the amount paid under the third exception to the account of J. L. Witmeyer, and for the reasons which we have heretofore given in answer to that exception, this exception is hereby sustained, and the said F. J. Heim, supervisor, is hereby surcharged with the amount of \$43.24.

Fourth. The item of \$55.65 arises in the same manner, and was paid under the same circumstances as the item paid to J. L. Witmeyer, which we have answered in

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the second exception to his account, and for the reasons therein set forth, this exception is sustained and the said F. J. Heim is hereby surcharged \$55.63.

In conclusion, we may say that we do not think the auditors' report, filed in this case, is such a full detailed statement as is contemplated by our Acts of Assembly, nor do we approve of the method in which payments were made and orders were drawn by the Board of Auditors of said South Manheim Township. The law clearly sets forth the duties of the supervisor and the treasurer with regard to the payment of township money and should be strictly followed, but for the reasons already set forth we do not feel that justice and equity demand any further surcharging.

Reported by A. W. Schalck, Pottsville, Pa.

Sausser v. Miller

An appeal from a judgment obtained in a magistrate's court taken to and filed in the Court of Common Pleas is an "action brought in the Court of Common Pleas" within the meaning of the Act 27 March, 1848, P.L. 265, extending to Berks County, Sections 4 and 5, Act 11 March, 1836, P.L. 76.

ACTIONS—APPEAL FROM MAGISTRATE'S JUDGMENT—ACT
27 MARCH, 1848, P.L. 265.

The defendant appealed from a magistrate's judgment and then filed a petition for an interpleader. The plaintiff demurred to the petition on the ground that it was too late to ask for an interpleader after judgment by the magistrate. Demurrer overruled.

PRACTICE—INTERPLEADER—DEMURRER.

No. 160, August Term, 1907, C.P. of Berks County.

Demurrer to Petition for Interpleader.

Joseph R. Dickinson, Esq., for Demurrer.

Rick & Nicolls, Contra.

Opinion by Endlich, P.J., January 23, 1909.

OPINION.

Plaintiff sued defendant before a magistrate and obtained a judgment which defendant appealed to this Court. Defendant then presented his petition for permission to pay the money into Court and for an order upon plaintiff and certain other parties who also claim it to interplead, himself disclaiming any interest in it. The plaintiff has filed a demurrer to defendant's petition because the action was not brought in this Court, and the

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petition, as presented after judgment by the magistrate, i.e., too late to ask for an order to interplead. The decision upon the demurrer must turn upon these grounds.

The defendant's application is under Act 27 March, 1848, P.L. 265, extending to Berks County, Sections 4 and 5, Act 11 March, 1836, P.L. 76. The plaintiff's contention is founded upon the language of the local statute, that in—

“any action which may hereafter be brought in the Court of Common Pleas * * * for the recovery of money * * * it shall be lawful for the defendant * * * after declaration filed and before plea pleaded * * * to disclaim,” etc.

It was held in *Stewart v. Eisenhower*, 3 Distr. R., 619, 15 Pa., C.C. Rep., 529, that an appeal from judgment of a magistrate is not an action “instituted” in the C.P. within the meaning of the Berks County Affidavit of Defence, Act 6 Feb., 1868, Sec. 4, P.L. 124, because of the strict interpretation applicable to that statute. On the other hand, in *Craig v. Brown*, 48 Pa., 202, it was declared to be “an action brought,” under a rule of Court requiring a declaration in a designated time; and doubtless that is the sense to be given to such phrase occurring in a remedial statute, entitled, like that of 1848, to a liberal construction. Being taken to and filed in the C.P., the appeal is necessarily an “action brought in the Court of Common Pleas,” and therefore distinctly within the terms of the statute referred to. Nor is it to be overlooked that for purposes of subsequent procedure, as distinguished from the cause of action, the proceeding upon appeal in this Court is practically *de novo*: See *Owen v. Shelhamer*,

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3 Binn. 45; *Wade v. Hook*, 11 Pa. Super. Ct., 54, 58. For these reasons there seems to be no warrant for holding that the Act of 1848 does not apply to a case coming here as this one does, the transcript standing as a declaration: Rule VI, Sec. 1, and there being no plea. That, indeed, the Act of 1836 permits an interpleader in just such a case has been expressly decided in *Moore's Pet'n*, 7 Kulp 97.

Certain other objections to the allowance of the interpleader prayed for by defendant in his petition are suggested by plaintiff's argument. But not being raised (and in part incapable of being raised) by the demurrer, they cannot properly be passed upon at this time. The overruling of the plaintiff's demurrer does not ipso facto make the rule for interpleader absolute.

The demurrer is overruled.

Reported by **Lentz & Moyer**, Reading, Pa.

Kingston Sanitarium Co. v. George Frantz

Judgment was rendered against defendant May 14, 1909, and bail was not entered until June 4, one day too late. The excuse urged for procrastination is that the magistrate informed the defendant on June 3 that "he had another day." Defendant knew that the law allowed twenty days for the appeal. Held, that the defendant's right to have an appeal is no more sacred than the plaintiff's right to have it taken according to law.

The magistrate had no power to extend the period prescribed by law.

If any meritorious defense were suggested, greater indulgence might be extended by the Court.

**JUDGMENT—NEGLECT TO ENTER BAIL WITHIN 20 DAYS—
MAGISTRATE HAS NO POWER TO EXTEND TIME.**

No. 528, June Term, 1909, C.P. of Luzerne County.

Rule to Quash an Appeal from a Justice of the Peace.

John E. Jenkins for Plaintiff.

James Scouton for Defendant.

Opinion by Fuller, A.L.J., July 1st, 1909.

OPINION.

This rule is based upon the proposition that bail was entered one day late, viz., on the 21st instead of the 20th day after judgment. In fact, judgment was rendered May 14, 1909, and bail was not entered until June 4, although the legal time expired June 3.

This fact is established by the original record upon the docket of the magistrate, and by the oral evidence on both sides, nor is it disputed.

Kingston Sanitarium Co. v. George Frantz.

In the filed transcript the recital of June 3 as the date of actual appeal is a clerical mistake and is open to impeachment as such.

The excuse urged for procrastination is that the magistrate informed the defendant on June 3 that "he had another day." The magistrate himself neither admits nor denies the truth of this excuse and simply fails to recollect the circumstance.

The defendant knew that judgment had been rendered on May 14, 1909, because he was personally present when it was publicly announced. He knew that the law allowed twenty days for the appeal. He knew both in fact and by legal presumption that the period expired on June 3. He was represented by learned counsel. He has never adequately divulged any defense upon the merits of the plaintiff's claim. He was fully able to determine for himself what should be done, and he was not prevented from doing it by any misbehavior of the magistrate, for example, by refusal to take bail. The latter had no power to extend the period prescribed by law.

The defendant's right to have an appeal is no more sacred than the plaintiff's right to have it taken according to law.

If any meritorious defense were suggested we should be disposed toward greater indulgence, but while we concede that the right of trial by jury is precious, we must contend that the right of speedy collection by honest creditors, in conformity with law, is equally precious.

The rule is made absolute.

Reported by G. Fred Lazarus, Esq., Wilkes-Barre, Pa.

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Appeals from assessments,—

No appeal lies from decision of the board of revision, except by the land owner. 227.

Neither the taxpayers, assessor, nor the Commonwealth have a right to appeal. 227.

Assessment,—

Supervisors, under Act April 12, 1905, P. L. 142, have authority to assess One Dollar against each taxable, even though a non-resident, in addition to the millage tax. 154.

The One Dollar Tax is a specific tax. 154.

Act of April 12, 1905, P.L. 142, requiring supervisors to assess each taxable One Dollar in addition to millage tax does not apply to a non-resident. 164.

TOWNSHIPS.

Filing certificate under Act April 22, 1905, P.L. 296,—

Township cannot appeal nunc pro tunc upon failure to file certificate with Prothonotary agreeably to Act April 22, 1905, P.L. 296. 209.

Highways,—

See SUPERVISORS. (Powers of.)

Liabilities,—

See SUPERVISORS. (Authority of.)

Suits on official bonds,—

See COUNTIES. (Suits on official bonds.)

Taxables,—

See TAXES. (Assessment.)

Taxes,—

See OFFICIAL BONDS. (Entry, effect of.)

TRESPASS.

Cause of action,—

See JURISDICTION, J. P. (Trespass on the case.)

Distinction as to jurisdiction,—

See NEGLIGENCE. (Injury to personal property.)

Vi et armis and "on the case" distinguished,—

See Birkhead v. Ward, appellant. 46.

What shall constitute,—

See LANDLORD AND TENANT. (Rights of tenant.)

UNDERTAKERS.

Liabilities,—

See BOROUGHES. (Police regulations.)

VAGRANTS AND TRAMPS.

Commitment and maintenance,—

See SHERIFF. (Compensation of.)

WAGES.

Attachment for board,—

Act of April 10, 1905, P.L. 134, is in conflict with Art. III, Sec. 7, of the Constitution. 253.

WATERS.

Changing Course,—

See SUPERVISORS. (Authority of.)

APPENDIX

Petition Under the Act of June 7, 1907, P. L. 444, for the Appointment of Viewers to Inquire of and to Change or Vacate the Whole or Any Part of a Public Road or Turnpike Forming the Division Line Between Two or More Townships.

In the Court of Quarter Sessions of the Peace, in and for the County of Montgomery, Pa.

To the Honorable, the Judges of said Court:

The petition of the undersigned property owners of the Townships of Worcester and Upper Gwynedd, said county,

RESPECTFULLY REPRESENTS:

That the public road forming the division line between the Townships of Worcester and Upper Gwynedd,

Beginning—(Here set out description of road designating accurately the terminii and giving the courses and distances, and the names of the owners along the line thereof;)

has become useless, (inconvenient or burdensome.)

That it is the desire of your said petitioners that said public road between said terminii should be vacated because of the fact that it is very difficult to keep in repair, hard to drain, is easily washed by freshets, etc., and that another better and more convenient public road has been laid out between said points.

Your petitioners, therefore, pray your Honors to appoint proper persons to view, inquire of and make report concerning the vacation of said public road, as required by the Act of Assembly in such case made and provided.

And they will ever pray, etc.

James Walton, etc.

State of Pennsylvania, }
County of Montgomery, } ss:

James Walton, being duly affirmed according to law, doth depose and say that the facts set forth in the foregoing Petition are true and correct to the best of his knowledge and belief.

Affirmed and subscribed
to before me this 2d
day of September, A.
D., 1908.

James Walton.

ELLWOOD HOOT. (Official Seal.)

Justice of the Peace.

My commission expires 1st Monday of May, 1910.

Note.—Petition must be signed by at least fifteen property owners of each Township.

DECREE.

And now, September 10, 1908, the Court having heard, read and considered the within and foregoing Petition, do hereby appoint A. D. Johnson, S. Y. Mathers and W. H. Zimmerman, Viewers, as prayed for.

BY THE COURT,

H. K. Weand,

Judge.

Petition to the Court of Common Pleas for Change
of Venue Under the Act of June 1, 1907, P. L. 374.

In the Court of Common Pleas in and for the County
of Montgomery, Pa.

To the Honorable, the Judges of said Court:

The Petition of James Lawson,

RESPECTFULLY REPRESENTS:

That he is the Plaintiff in a suit entered in the Court
of Common Pleas of Montgomery County, Pa., as of No.
31, October Term, 1906, and wherein George Carthy is
the defendant.

That there is a large number of cases at issue, and
which, owing to their priority, will have to be tried before
the case above referred to, in which your petitioner is
the plaintiff.

That the issue raised by the pleadings in said case
cannot be tried in said Court within six months from this
date, owing to the fact that there are too many cases to
be disposed of before that in which your petitioner is
interested can be reached.

The petitioner has served notice upon the defend-
ant, a copy of which is hereto annexed, agreeably to the
Rules of Court, and, therefore, prays that your Honors
will fix a time of hearing thereon, and that a change of
venue be granted to the most convenient Judicial Dis-
trict adjoining that in which said suit was instituted,
agreeably to the Act of Assembly in such case made and
provided.

James Lawson.

Montgomery, ss:

James Lawson, being duly affirmed according to law, doth depose and say that the facts set forth in the foregoing Petition are true and correct to the best of his knowledge and belief.

Affirmed and subscribed
to before me this 8th
day of September, A.
D., 1908.

James Lawson.

ABRAM D. HALLMAN,
Prothonotary.

Petition for the Appointment of Commissioners to Establish and Ascertain the Lines and Boundaries Between Two or More Cities, Boroughs or Townships, Cities and Boroughs or Townships and Boroughs, under the Act of June 3, 1893, P. L. 284.

The Petition of the Burgess and Town Council of the Borough of Souderton, Montgomery County, Pa.,

RESPECTFULLY REPRESENTS:

That there is some dispute concerning the lines dividing the said Borough of Souderton from the Township of Franconia, out of which the said Borough was originally carved,

(Here state particularly the matters in dispute as to lines or boundaries,)

and it is desired that the lines or boundaries of said Borough shall be accurately ascertained and established, so that monuments may be placed at the corners or angles thereof.

Your petitioner, therefore, prays your Honors to appoint three impartial men, one of whom shall be a competent Surveyor, to view the said lines or boundaries, make a plot or draft thereof, and make report to the next Court of Quarter Sessions, together with their opinion of the same, agreeably to the Act of Assembly in such case made and provided.

And they will ever pray, etc.

THE BOROUGH OF SOUDERTON,

By.....

President of Town Council.

Attest:....., Secretary.

....., Burgess.

State of Pennsylvania, }
County of Montgomery, } SS:

George N. Zendt, being duly affirmed, according to law, doth depose and say that he is Secretary of the Town Council of the Borough of Souderton, and that the facts set forth in the foregoing Petition are true and correct to the best of his knowledge and belief.

Affirmed and subscribed }
to before me this 21st } George N. Zendt.
day of September, A. }
D. 1908. }

A. G. Reiff, (Official Seal.)
Justice of the Peace.

Commission expires 1st Monday of May, 1909.

Petition for Change of Polling Place Under the Act
of May 18, 1893, P. L. 106.

In the Court of Quarter Sessions of the Peace, in and
for the County of Montgomery, Penna.

To the Honorable, the Judges of said Court:

The Petition of the undersigned Electors of the Elec-
tion District of Montgomery Township, said county,

RESPECTFULLY REPRESENTS:

That by reason of the fact that the largest number of
electors have their residences nearer and of easier access
to the Public House of _____ at Mont-
gomery Square, in said District, than they have to the
present polling place at the Public House of _____

_____, at Montgomeryville, in said District,
they are desirous of having the polling place changed from
the latter to the former place. The Public House of _____
_____, at Montgomery Square, con-
tains a very large room on the first floor, well lighted,
and of convenient access, and the accommodations are
ample and suitable for holding elections.

They therefore, pray your Honors to make a decree
directing that the polling place be changed from the Pub-
lic House of _____, at Montgomeryville,
as aforesaid, to the Public House of _____,
at Montgomery Square, said Township of Montgomery,
agreeably to the Act of Assembly in such case made and
provided.

And they will ever pray, etc.

J. F. Kile, etc.

State of Pennsylvania, }
County of Montgomery, } SS:

J. F. Kile, being duly affirmed, according to law, doth depose and say that the facts set forth in the foregoing Petition are true and correct to best of his knowledge and belief.

Affirmed and subscribed
to before me this 21st
day of September, A.
D. 1908. }

J. F. Kile.

Charles S. Knapp, (Official Seal.)
Notary Public.

Commission expires April 18, 1911.

Petition under the Act of February 24, 1843, P. L. 70, Section 19, for the Payment of Proceeds into Court or to the Executor, by Leave of Court.

In the Orphans' Court in and for the County of Montgomery, Penna.

To the Honorable William F. Solly, President Judge of the said Court.

The petition of the undersigned, James Craig and Charles Kreps,

RESPECTFULLY REPRESENTS:

That Abram H. Carn, late of the Township of White-marsh, County of Montgomery and State of Pennsylvania, became seized in his life time, inter alia, of the hereinafter described real estate, and being so thereof seized, died on or about the 23d day March, A.D. 1904, having first made his last will and testament, dated the 17th day of November, A.D. 1896, a copy of which is hereto attached, wherein he provided, amongst other things, that all his just debts be paid within one year after his demise, from the first money coming into the hands of the Executrix, and, further, if his Executrix therein named, Amanda C. Carn, desired, his real estate might be sold at either public or private sale, empowering her to make good and sufficient deed or deeds for the conveyance of the same, the proceeds of the sale or sales to be invested in safe securities.

The Testator further provided that after the death of his wife, the said Amanda C. Carn, the estate should be divided, giving unto Ella B. Rowland, the income or in-

terest on one-third of his estate, during her natural life and no longer, to be invested under direction of the Orphans' Court, at the best rate of interest that could be obtained, with safety to the investment. Said interest to be paid to her semi-annually. After her death said one-third so set apart for her, is to be equally divided between Alice B. Carn and Mary K. Carn, except five hundred dollars, which is to be paid to George W. Porter, out of said Ella's share. No further disposition was made as to the remaining two-thirds, which, by the terms of said will, apparently, however, would go to his other two children, one-third to each said Alice B. Carn and Mary K. Carn.

That the said Amanda C. Carn, widow and executrix of the said testator, and the said Ella B. Rowland, George W. Porter, Alice B. Carn and Mary K. Carn, being all the parties in interest, are of full age and under no legal disability.

That your petitioners are advised that under the law there is no conversion of the real estate of the said testator, and that it is obligatory on the part of the purchaser or purchasers of any of his real estate from the said executrix, to see to the proper application of the purchase money.

Your petitioner, James Craig, further represents that on the 23d day of February, A.D. 1907, he entered into an agreement with the said Amanda C. Carn, Alice B. Carn, Mary K. Carn and Ella B. Rowland, for the purchase of

ALL THAT CERTAIN lot or piece of land, situate at Fort Washington, in the Township of Whitemarsh, County of Montgomery, and State of Pennsylvania, bounded and described as follows:

(Insert Description)

for the price or sum of four hundred and twenty-five (\$425) dollars.

Your petitioner, Charles Kreps, also represents that on the 16th day of February, A.D., 1907, he entered into an agreement with the said Amanda C. Carn, Alice B. Carn, Mary K. Carn and Ella B. Rowland, for the purchase of

(Insert Description)

for the price or sum of six hundred (\$600) dollars.

Your petitioners pray for leave to pay the said consideration moneys to the said Amanda C. Carn, Executrix of Abram H. Carn, deceased, to be disposed of according to the uses and trusts contained in said testator's will, whereby said payment shall be deemed valid against all persons having or who may have an interest therein.

And they will ever pray, etc.

JAMES CRAIG.

CHAS. KREPS.

Montgomery County, SS:

James Craig and Charles Kreps, being duly affirmed according to law, do depose and say that the facts set forth in the foregoing petition are true and correct to the best of their knowledge and belief.

Affirmed and subscribed
to before me this 4th
day of May, A. D.
1907.

JAMES CRAIG.

CHAS. KREPS.

Harold G. Knight,
Notary Public.

Commission expires Jan. 21, 1911.

To the Honorable William F. Solly, President Judge of said Court:

The undersigned, being all the parties in interest in the estate of Abram H. Carn, late of the Township of Whitemarsh, County of Montgomery and State of Pennsylvania, deceased, do hereby concur in the prayer contained in the foregoing petition, and do further certify that all the debts of Testator have been fully paid and satisfied and an account was filed and came up for audit and was confirmed and adjudicated on the 20th day of May, A.D. 1905.

They therefore pray your Honorable Court to make a decree as prayed for in the foregoing Petition.

And they will ever pray, etc.

AMANDA C. CARN,
ELLA B. ROWLAND,
ALICE B. CARN,
MARY K. CARN,
GEO. W. PORTER.

In the Orphans' Court, in and for the County of Montgomery, Pa.

In re Estate of Abram H. Carn, deceased.

DECREE:

And now, to-wit, the seventh day of May, A.D. 1907, the Court having heard, read and considered the within and foregoing Petition, and being satisfied with the propriety thereof, does hereby order and decree that the within-named James Craig and Charles Kreps pay over unto Amanda C. Carn, Executrix of Abram H. Carn, deceased, the consideration moneys due by each of them respectively for the purchase of the within-described real

estate, being a part of the real estate of the said Abram H. Carn, deceased, to be disposed of by the said Amanda C. Carn, Executrix, as aforesaid, according to the uses and trusts contained in the last Will and Testament of the said Abram H. Carn, deceased, and such payment shall be deemed valid against all persons having or who may have an interest therein.

BY THE COURT:

Wm. F. Solly,
President Judge.

COPY OF WILL

I, Abram H. Carn, of the Township of White-marsh, County of Montgomery, and State of Pennsylvania, do make and publish this, my last will and testament, revoking and making void all former wills at any time heretofore made.

First. I direct that all my just debts be paid within one year after my demise from the first money that comes into the hands of my Executrix.

Sec'd. I bequeath absolutely to my wife, Amanda C. Carn, the following personal property: The stock of store goods, book accounts, all the household goods, horses, cattle, wagons, implements, crops, housed and growing; in fact, everything that is personal property, except promissory notes, stocks, bonds, judgments and mortgages.

Third. I direct that my wife, Amanda, shall have the whole income of my real estate and the whole interest or dividends arising from investments of promissory

notes, stocks, bonds, judgments or mortgages, and that she is hereby empowered to collect the interest or dividends and the principal, if necessary. In case any of the investments are paid off or it becomes necessary to collect them, they shall be re-invested as soon as a safe investment can be had the whole of the above-named income to be for her sole use as long as she remains my widow. In case she marries again, then she shall have a one-third interest of the real estate and one-half of the interest of the investments.

The other part to be divided amongst the children in proportions as is hereafter directed:

Fourth. If my Executrix so desires, my real estate may be sold at either public or private sale, and my Executrix is hereby empowered to make good and sufficient deed or deeds for the conveyance of the same, the proceeds of the sale or sales shall be invested in safe securities.

Fifth. I direct that, after the death of my wife, Amanda, my estate shall be divided as follows, viz: That Ella B. Rowland shall have the income or interest of one-third of my estate during her natural life and no longer. This one-third part for the use of Ella B. Rowland shall be invested under the direction of the Orphans' Court at the best rate of interest that can be obtained for safety to the investment and the said interest be paid to her semi-annually.

After her death the one-third part of the estate set apart for her use shall be equally divided between Alice B. Carn and Mary K. Carn or their issue except Five hundred Dollars which is to be paid to George W. Porter out of Ella's one third after her death and that the bal-

ance remaining shall be equally divided between Alice B. Carn and Mary K. Carn or their issue.

In case either of my daughters die and not leaving issue, her share shall go to the surviving one.

In case either of my daughters marry and die, leaving no issue but surviving husband, said husband shall not receive any portion of said deceased wife's share.

I do hereby constitute and appoint my wife, Amanda C. Carn, my sole Executrix.

I, the said Abram H. Carn, do hereby set my hand and seal this 17th day of November, One Thousand Eight Hundred and Ninety-six.

Abram H. Carn. (Seal.)

Form of Petition for satisfaction of two mortgages and charge upon land, which may be varied to suit circumstances, i. e., a case where but one mortgage or one charge, is to be satisfied or released of record.

IN THE COURT OF COMMON PLEAS IN AND
FOR THE COUNTY OF MONTGOMERY, PA.

To the Honorable, the Judges of said Court:

The Petition of Edward Hack, of the Township of Skippack, County of Montgomery and State of Pennsylvania,

RESPECTFULLY REPRESENTS:

That he is the owner of

A certain messuage and three tracts of land, situate in the Township of Skippack, County of Montgomery and State of Pennsylvania, separately bounded and described as follows:

No. 1—(Insert full description.)

Containing 7 acres of land.

No. 2—(Insert full description.)

Containing 5 acres and 141 perches of land.

No. 3—(Insert full description.)

Containing 2 acres of land.

That Peter Kider and Gertrude, his wife, predecessors in title, of 181 acres of land, "be the same more or less," situate in the townships of Skippack and "Perkioming," and of which the above-described premises formed a part, executed a Mortgage in favor of Henry Penni-

backer, August 5th, A.D. 1885, in the sum of seventy pounds, payable as was also the Bond accompanying the same, on August 25th then next ensuing. Said Mortgage being recorded in the Recorder's Office at Norristown, in and for the County of Montgomery, Pa., February 3d, A.D. 1786, in Mortgage Book No. 1, Page 46.

That no satisfaction has ever been entered on the margin of the record of said Mortgage by the said Henry Pennibacker, by himself, his Assignee, or any other person.

That Christian Fryer, a predecessor in title, of a mesuage and two tracts of land, containing in the aggregate 92 acres, situate in the townships of Skippack and Perkiomen, and of which the above-described premises formed a part, executed a Mortgage in favor of Jacob G. Sorver and Benjamin Reiff, Executors of the last Will and Testament of Jacob Sorver, deceased, on May 8th, A.D. 1846, in the sum of Three Thousand Dollars, payable as was also the Bond accompanying the same, on April 1st, next ensuing. Said Mortgage being recorded in the Recorder's Office aforesaid, in Mortgage Book No. 27, Page 192.

That a satisfaction in full was entered upon the margin of the said last recited Mortgage by Jacob G. Sorver, signing his name "J. G. Sorver, one of the Executors of Jacob Sorver, Sen., deceased," on April 7th, A.D. 1851.

That no satisfaction has ever been entered on the margin of said Mortgage, by the other of said Mortgagees, Benjamin Reiff, either by himself, his Assignee, or any other person.

That no Assignments of either of the said above-mentioned mortgages appear of record, as is shown by the Recorder's Searches hereunto attached, and your

Petitioner has been unable to locate either the said Henry Pennipacker, or the said Benjamin Reiff, Executor, the presumption being that they are dead; nor has he been able to find who their heirs or legal representatives are, or where they reside.

That a period of more than twenty-one years has elapsed since the principal of each of the above-recited Mortgages became due and payable, and no payment nor demand therefor of either principal or interest has been made within said period of twenty-one years last past on account of said Mortgages, by the owner of the land sought to be released and discharged, nor so far as can be ascertained. was any such payment made by his predecessors in title.

That as a part of the consideration in the deed of Jacob Reiff, et ux., to George C. Reiff, dated February 16th, A.D. 1833, and recorded in the Recorder's Office aforesaid, in Deed Book No. 50, page 473, conveying a messuage and tract of 68 acres and 68 perches of land, situate in the townships of Skippack and Perkiomen, whereof the premises hereinbefore described, formed a part, there is the following charge, immediately preceding the description:

"As also in consideration of the further sum of Eight Hundred Dollars of like money, part of the purchase money, to be paid with its interest comfortably to the conditions of an obligation bearing even date herewith," "have granted, bargained, &c.", and also after the tenendum:

"Under and Subject to the payment of the principal sum of Eight Hundred Dollars, as aforesaid, with its interest, according to the true intent and meaning of the above-mentioned Bond."

That a period of more than twenty-one years has elapsed, during which time no payment nor demand therefor has been made upon said Bond or any part thereof by the owner of the land seeking a release and discharge thereof, nor, so far as can be ascertained, by his predecessor in title.

That no payment nor demand therefor having been made within twenty-one years last past, the presumption is, and your petitioner believes that said charge has been paid, although no release appears of record. Your petitioner further avers that he does not know the whereabouts of said holder, nor his or her legal representatives.

That no sufficient satisfaction, release, acquittance or acknowledgment of the payment of said mortgages and charge appear of record in said County of Montgomery, where said land is situate, and no payment having been made nor demand made therefor within a period of twenty-one years last past, as aforesaid, upon either of said mortgages or said charge, and the presumption of payment having long since arisen by lapse of time, on all of said charges, your Petitioner, believing that said mortgages and charge have been fully paid and satisfied, prays that your Honors make a Decree directing the Sheriff of the County of Montgomery to give notice, agreeably to the Act of May 8, 1895, P.L. 44, decreeing and directing that said lands subject to said mortgage encumbrances and charge of Eight Hundred Dollars upon the hereinbefore described messuage and tracts of land, being part of said mortgaged premises or land charged as aforesaid, be released and discharged from the lien of said mortgage encumbrances and charge and the payment thereof, and that

a copy of this petition and decree be entered of record in the Recorder's Office, as aforesaid, upon the recording of which decree and record and the payment of the charges, the said described premises shall forever thereafter be released and discharged from the encumbrances and charges contained in said mortgages and said charge of Eight Hundred Dollars, and shall bar all actions brought or to be brought thereon.

And he will ever pray, &c.

Edward Hack.

Montgomery County, ss:

Edward Hack, being duly affirmed according to law, doth depose and say that the facts set forth in the foregoing Petition, are true and correct to the best of his knowledge and belief.

Affirmed and subscribed to before me this 29th day of July A.D. 1907.	}	Edward Hack.
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FREAS STYER, (Official Seal.)
Notary Public.
Commission expires Jan. 16, 1909.

PRELIMINARY DECREE:

And now, to-wit, the 1st day of July, A.D. 1907, the within Petition having been heard, read and considered and duly filed, the Court hereby directs that the Sheriff of Montgomery County give notice to all such known parties in the county, whose residences are known,

by copy served personally or left at their places of abode, and to all parties out of the county, if any, and to all unknown parties, if any, by public notices, published once a week for four successive weeks in the Montgomery County Law Reporter and Montgomery Transcript, which notice shall briefly state the facts contained in said Petition and the mortgages and charge of Eight Hundred Dollars, described in said Petition, and require the parties to appear in Court on Tuesday, the 3d day of September, A.D., 1907, at 10 o'clock a.m., to answer the Petition and show cause, if any they have, why a Decree should not be entered, directing that the lands described in said Petition, subject to said mortgage encumbrances and charge of Eight Hundred Dollars, be released and discharged from the same, in accordance with the Act of May 8, 1895, P.L. 44.

By the Court,
AARON S. SWARTZ, P.J.

FINAL DECREE:

And now, to-wit, the 3rd day of September, A.D. 1907, it appearing to the Court that notice was given by the Sheriff, as directed by the Decree of 1st day of July, A.D. 1907, and no person appearing to answer said petition, it is hereby decreed and directed that the lands described in the foregoing Petition, subject to the Mortgage encumbrances and charge of Eight Hundred Dollars and every part thereof, shall be released and discharged from the same and payment thereof, and that a copy of this Petition and Decree shall be entered in the office of the Recorder of Deeds of Montgomery County, Pa., at the cost of the Petitioner, which decree and record

shall forever operate as a release and discharge of the premises in said Petition, described from the lien of said mortgage encumbrances and charge of Eight Hundred Dollars, and shall bar all actions brought or to be brought thereon.

By the Court,
AARON S. SWARTZ, P.J.

Proceeding for the Collection of Rent by Distress
under the Act of March 21, 1772, 1 Sm. L. 370,
Section 1.

LANDLORD'S WARRANT

Mr. James Ward,

To John Carter, Dr.

To balance of rent due month ending December	
1, 1908	\$15 00
Rent due month ending January 1, 1909.....	20 00
	\$35 00

County of Montgomery, }
Commonwealth of Pennsylvania, } ss:

To J. Monroe Springer, Constable:

Whereas, James Ward is now indebted to me in the above sum, for rent due for the use and occupation of the premises, situate on the northeast side of Main street, in the borough of Lansdale, Montgomery county, Pa., adjoining lands of Job Richards, et al., you are hereby

authorized and empowered to collect the above bill of Rent, by distraining the goods and chattels of the said James Ward, or of any person or persons lying or being upon said premises, according to the Act of Assembly in such case made and provided; and to proceed to sell the same according to law, for the best price that can be obtained for the same, returning the overplus, if any, to the said James Ward, after paying the said Rent and all legal costs and charges for such distress. In the written Lease, Lessee agreed to pay his rent in advance, waived the benefit of the \$300 law, and agreed that goods might be followed for thirty days after removal.

Witness my hand and seal this 18th day of December, A.D., 1908.

John Carter, (Seal.)

The Constable, making the levy, should set out upon his warrant, at the bottom thereof, or on a paper attached thereto, a list of the goods levied upon by him, as follows:

By virtue of the above Landlord's Warrant, I do levy on the following goods being on the premises to-wit:

(Here insert the goods levied upon).

Together with all and singular the goods and chattels on the premises sufficient to pay the rent due and costs.

J. Monroe Springer,
Constable.

The Constable should also deliver a list of the goods levied upon, with notice to the tenant to pay the rent due or replevy the goods and chattels within five days, as follows:

John Carter
vs.
James Ward.

By virtue of a Landlord's Warrant, to me directed, and dated the 18th day of December, A.D. 1908, for the sum of Thirty-five Dollars, I hereby levy on the following goods, being on the premises, in said Warrant described.

Debt	\$35 00
Costs	1 56

To-wit:

(Here insert the goods levied upon, which must be an exact copy of the list attached to the Warrant.)

Together with all and singular the goods and chattels on the premises, sufficient to pay the rent due and costs.

J. Monroe Springer,
Constable.

FORM OF NOTICE:

To James Ward.

Take notice that by authority and on behalf of your landlord, John Carter, I have this day distrained the several goods and chattels, specified in the above schedule, on the premises, situate on the northeast side of Main street, in the borough of Lansdale, county of Montgomery, Pa., adjoining lands of Job Richards, et al., for the

sum of Thirty-five Dollars' Rent due to him, the said John Carter, as aforesaid, and that if you do not pay the said rent or replevy the same goods and chattels, according to law, within five days hereafter, I shall, after the expiration of five days from the date hereof, cause the said goods and chattels to be appraised and sold according to the Act of Assembly in such case made and provided.

Given under my hand the 19th day of December, 1908.

J. Monroe Springer,
Constable.

Constables are sometimes unwilling to make distraint for rent, unless they are protected by an indemnifying Bond. The following is a form of Bond for such purpose, which may also be varied, in case of execution.

KNOW ALL MEN BY THESE PRESENTS, That we, John Carter and Thomas Smith, of the borough of Lansdale, county of Montgomery and State of Pennsylvania, are held and firmly bound unto J. Monroe Springer, Constable, of the said borough of Lansdale, in the sum of Two Hundred Dollars, to be paid to the said J. Monroe Springer or his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made and done, we do bind ourselves, our heirs, executors and administrators, and every of them firmly by these presents. SEALED with our seals. DATED the 18th day of December A.D. 1908.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas a Landlord's Warrant has been issued by John Carter, of the borough of Lansdale, Pa., directed to the above-named J. Monroe Springer, Constable of the said borough of Lansdale, at the instance of the said John Carter against James Ward, of the said borough of Lansdale. If, therefore, the said John Carter and Thomas Smith, their heirs, executors and administrators, shall and will from time to time and at all times hereafter indemnify and save harmless the said J. Monroe Springer Constable, aforesaid, his executors and administrators, for and on account of his seizing, distraining, removing and selling, by the direction of the said John Carter and by virtue of the said Landlord's Warrant, the goods and chattels of any person, as aforesaid, contrary to law, then this obligation to be void and of none effect, else to be and remain in full force and virtue.

Signed, Sealed and Delivered in the presence of:

Arthur Reed,
Horace Moore.

John Carter, (Seal.)

Thomas Smith, (Seal.)

The constable must, in all cases, follow the Act of Assembly in every particular.

The distraint must be made on the premises, for the occupation of which the rent is due.—Grant & McLane's Appeal, 44 Pa., 477.

Whatever serves as a barrier to keep people out, cannot be forced open in order to make a legal distress. The constable may not climb over gates and enclosures—

Jackson & Gross, *Landlord & Tenant*, 2d Edition, Par. 1157.

A peaceable and not a forcible entry on the premises should be made. A constable should not so much as turn the door knob and enter. If he can enter through an open door or open window and once gets inside, he may break open inner doors, if necessary, and if once legally inside, he may then make forcible re-entry.—2 Taylor, *Landlord & Tenant*, Sections 578 and 582.

If admittance is refused a constable, he cannot then legally take the law into his own hands, and enter against the will of the tenant. This rule applies also to a barn or other out-building. Where a landlord picked a lock after the tenant locked a door, he became liable to trespass.—*Com. v. Moreland*, 9 W. N. C., 272; *Murray v. Vaughn*, 16 C.C. 657.

If the constable cannot effect an entrance, he should distrain what can be found upon the premises.

As a general rule, all personal property found on the premises may be distrained, even the goods of a stranger or the wife's separate property.—*Kessler v. M'Conachy*, 1 Rawle, 435; *Kleber, etc., v. Ward*, 88 Pa., 93; *Blanche v. Bradford*, 38 Pa., 344. Any cattle or stock of the tenant feeding or depasturing on the demised premises, also all sorts of corn, grass, hops, roots, fruits, pulse, or other product whatsoever, which shall be growing on the demised premises, may be distrained, and the purchaser of any such corn, grass, hops, roots, fruits, pulse, or other product shall have free egress and regress to and from the same where growing, to repair the fences from time to time, and when ripe, to cut, gather, cure, and lay up and thresh and carry away the same.—*P. & L. Landlord & Tenant*, 4; 1772, 1 Sm. L., 370, Section 7.

ITEMS OF INTEREST.

The right of insurance companies to provide in their policies that no officer, agent, or other representative of the company shall have the power to waive stipulations in the policy as to inventories and keeping of the books in a fire-proof safe, unless the waiver is indorsed on the policy or added thereto, is sustained in *Gish v. Insurance Co. of N.A.* 16 Okla. 59, 87 Pac. 869, 13 L.R.A. (N.S.) 826; and such limited grant of authority is held to be the measure of the agent's power.

The officers of a mutual-benefit society are held, in *Elliott v. Knights of Modern Maccabees*, (Wash.), 89 Pac. 929, 13 L.R.A. (N.S.), 856, to have no power to waive a by-law so as to admit persons of prohibited age.

And the knowledge of a soliciting agent of an insurance company who took an application, of the falsity of a material answer therein, is held, in *Iverson v. Metropolitan L. Ins. Co.* (Cal.) 91, Pac. 609, 13 L.R.A. (N.S.) 866, in the absence of any fraud or misrepresentation as to his authority to waive the conditions of the application, not to be imputable to the company so as to constitute a waiver, where the application warranted the answer to be true, and expressly limited the authority of the agent to waive the conditions of the application. An elaborate note to the L.R.A. report of these cases reviews the other authorities on effect of non-waiver agreement on conditions existing at inception of insurance policy.

Under the cancellation clause in a standard policy of fire insurance, it is held, in *Davidson v. German Ins. Co.* (N.J.), 65 Atl. 996, 13 L.R.A. (N.S.) 884, that the company is not required to pay or tender the unearned premiums in order to bring about a cancellation of the policy.

And the right of insured, after receiving notice from the insurer of the cancellation of the policy, to treat the same as in full force and effect until the company has paid or tendered him the unearned premiums under the cancellation clause of the New York standard policy of fire insurance, is held, in *Buckley v. Citizens' Ins. Co.*, 188 N.Y., 399, 81 N.E. 165, 13, L.R. A. (N.S.), 889, to be waived by his voluntary and unconditional surrender of the policy upon receiving the notice of cancellation.

What May Not Be Distrained

Where the tenant, in course of his business, is necessarily put into the possession of property of those with whom he deals, or with those who employ him, such property, although on the demised premises, is not liable to distress for rent due thereon from the tenant.—*Karns v. McKinney*, 74 Pa., 387. Goods placed in the way of trade in storage are not liable to distress.—*Brown, etc., v. Sims, etc.*, 17 S.&R., 138.

Goods of a guest for rent due by an innkeeper, grain sent to a mill or on a wharf, goods of the principal in the hands of a factor on commission, and goods in the custody of the law, as held under writ of attachment, are not liable to distress for rent due thereon from a tenant.—*Pierce v. Scott*, 4 W.&S., 344; *Howe, etc., v. Sloan*, 87 Pa., 438. Further exemptions from distraint are as follows:

1. Things which are fixed to the freehold, as doors, windows, etc. Machinery merely bolted to the freehold, it seems, can be distrained.
2. Things which cannot be returned to the owner in as good condition as at the time when they were taken, as milk, fruit, etc.
3. Chattels already in custody of the law.
4. Things in actual use, as a hatchet, with which a man is working, the horse which he is riding. The reason for this arises from the anxiety with which the law guards against incitement to breach of the peace.—3 Black, Com. Ch., 1; 3 Kent, Com., 478.

5. Leased or hired pianos, melodeons and organs are exempt from distress, provided that the owner or his agent shall have given previous notice to the landlord or his agent that the instrument is leased or hired.—P.&L., Land. and Ten., 5; 1876, P.L., 171.

6. Chattels sold in good faith and for a valuable consideration, before seized for rent due.—Clifford v. Beems, 3 Watts 246. See also Beltzhoover v. Waltman, 1 Watts v. Sergeant, 416.

7. All wearing apparel of the tenant and his family, and all Bibles and school books in use in the family.—P.&L., Execution, 17; 1849, P.L. 533.

8. Family pictures or portraits are exempt.

9. Sewing machines belonging to seamstresses or used and owned by private families are exempt.—P.&L., Execution, 24; 1870, P.L. 35.

10. Sewing machines and typewriting machines leased or hired are exempt, provided the owner of such machine, or his agent, or the person leasing or hiring the same, shall give notice to the landlord or his agent that the instrument is leased or hired.—P.&L. Land. and Ten., (Sup.); 1895, P.L., 282.

Instructions to Officers Making Distress

The constable, to whom the landlord's warrant is directed, having proceeded to the demised premises and having obtained peaceable admittance, may distrain all goods upon the premises, if necessary, in obedience to his warrant. He must be within view of the goods. He need not necessarily see every petty article, but may distrain upon the furniture in a room, without seeing every piece.

The fact that the constable is acting under the landlord's warrant, and is within view of, and has undisputed control over, the goods, gives him the authority to make the distraint.

The name of each article, as it is distrained, should be called out, so that those present may know what is distrained, and at the same time, the constable should make an inventory of the articles distrained. The inventory is for the purpose of identification, and it is the duty of the constable to deliver a copy thereof to the tenant or one of the adult members of his family.

The constable may leave the goods upon the premises until after the sale.

The better practice is to procure the consent of the tenant in writing. Should he, however, refuse to allow the goods to remain until after the sale, they may be left there until after the appraisement shall have been made, after which they should be removed, notice having been given to the tenant of the place where the goods may be stored. The constable may remove the goods immediately after the distraint, or lock the same up in one of the

rooms. A watchman may also be placed in charge of the goods, if desired.

After making distraint, the officer is required to deliver to the tenant or adult member of his family a copy of the schedule of goods and chattels levied upon, giving him notice thereof and stating the *cause of taking*, or the making of the levy.

Snyder, &c., v. Boring & Blair, 4 Sup. Ct., 196.

APPRAISEMENT.

The Act of March 21, 1772, 1 Sm. L., 370, requires that after such distress and notice, and the expiration of five days, the officer making the distraint shall, by two reputable freeholders, after being sworn or affirmed, cause the goods and chattels so distrained to be appraised. Five full days must elapse before appraisement is made; the day when goods are seized is excluded, and if the fifth day falls on a Sunday, it must also be excluded. For instance, if a levy is made on June 2, 1909, the appraisement cannot be made until June 8th, 1909; and if the levy is made on a Tuesday, the fifth day falling on a Sunday, the tenant has all of Monday and the appraisement cannot be made until Tuesday following.

Snyder, &c., v. Boring & Blair, 4 Sup. Ct., 196.

Brisben v. Wilson, 60 Pa., 452.

Starr v. Simon, 9 C.C. 15.

Davis v. Davis, 128 Pa., 100.

Proceedings for Obtaining Possession of Real Estate
Purchased at Judicial Sales, Under Act of April
20, 1905, P. L. 209.

In the Court of Common Pleas of Montgomery County, Pa.

To the Honorable the Judges thereof:

The Petition of J. Jay Corson,

RESPECTFULLY REPRESENTS:

That he is the owner of

ALL THAT CERTAIN plantation, with the mes-
suage thereon erected, situate in the Township of Lower
Providence, County of Montgomery and State of Penn-
sylvania, bounded and described as follows, to-wit:

BEGINNING at a marble stone set for a corner in
a public road leading from Presbyterian Church to the
Perkiomen and Germantown Turnpike Road, a corner of
this and land of the Lower Providence Presbyterian
Church, thence along said road and land south forty-
three degrees, twenty minutes west, sixteen and eighty-
eight hundredths perches to a stone in the middle of the
Ridge Turnpike Road, thence along the middle of said
Ridge Turnpike Road north thirty-two degrees, ten min-
utes west, eighty-five and three-tenths perches to a stone
set for a corner in the middle of said Ridge Turnpike Road
and lands of John Rittenhouse, John Harding, deceased,
and Jacob G. Custer's land, thence along said Jacob G.
Custer's land in the middle of a public road leading from
said Ridge Turnpike Road to the Perkiomen and Ger-
mantown Turnpike Road north forty-eight degrees, twen-

ty-three minutes east sixty-five and seventy-two hundredths perches to an old stake in said road, and thence by land of Jacob Bealor south forty-one degrees, thirty-seven minutes east eighty-five and three-tenths perches to a stake a corner in the first-mentioned public road, thence along said road south forty-eight degrees, five minutes west ten and five hundredths perches to a stake, thence by land of said Jacob Bealor and the late John Hiser south, forty-four degrees east, eighty-nine and six-tenths perches to a stake, thence by said Hiser's land south forty-eight degrees, thirteen minutes west, forty-six and sixty-four hundredths perches to a stone, thence by land of James Rutherford and by land of said church north forty degrees, forty-seven minutes west, eighty-nine and forty-five hundredths perches to the place of beginning.

CONTAINING Sixty Acres of land, more or less.

EXCEPTING and reserving thereout a certain tract or piece of land containing twenty-four and seventy-nine hundredths Acres of land granted and conveyed by the said Jesse L. Snyder and wife to Frederick A. Poth, in fee, as reference to said deed recorded in Deed Book No. 500, page 27, etc., will fully and more particularly appear.

By virtue of a deed from Chauncey J. Buckley, Sheriff of said County, dated March 1, 1909, and recorded in the Recorder's Office of said County, March 8, 1909, in Deed Book No. 604, page 229, etc.

That his title to said property arose under the following proceedings:

Edgar A. Ruthman and Josephine H. Ruthman, his wife,	Mortgage dated October 25, 1906.
to	Ex die, Recorded in Mortgage Book, No. 446, page 1.
The Excelsior Savings Fund and Loan Association, of Norristown.	Securing \$7,000 on the premises above described.
	Payable after one year.
The Excelsior Savings Fund and Loan Association	In the Court of Common Pleas of Montgomery County, Pa.
v.	Scire Facias.
Edgar A. Ruthman and Josephine H. Ruthman, his wife, mortgagors, and Josephine H. Ruthman, owner.	Mortgage above mentioned issued Nov. 16, 1908, No. 43, to Dec. Term, 1908.

1908.

Judgment entered Dec. 19, 1908, for \$7689.36 and costs, in Docket K-2, page 389.

Levari Facias on said judgment, No. 13, to March Term, 1909.

Return "sold real estate to J. J. Corson, for \$3750.00."

March 1st, Deed Poll acknowledged.

March 8th, Deed Poll recorded and delivered.

That the persons in possession of said property are J. A. Cookes and Cookes, his wife, and they came into possession immediately through a lease made to them or one of them by the said mortgagors and

defendants, after the said proceedings in said mortgage had been instituted, the said property being vacant and unoccupied when said Writ of Scire facias was served.

That the said J. A. Cookes and Cookes, his wife, had notice of the title of your petitioner on March 20, 1909, and were requested to deliver up possession of said premises, which they then agreed to do, but, subsequently, to-wit: April 3, 1909, refused to deliver up the same.

That said respondents have no right of possession, and your Petitioner prays your Honorable Court that a Citation issue to the persons in possession, Commanding them to appear and answer said petition and show cause, if any they have, why possession of said real estate should not be delivered to your Petitioner.

And he will ever pray, etc.

J. Jay Corson.

Montgomery County, ss:

J. Jay Corson, above-named, being duly sworn, deposes and says that the facts set forth in the foregoing Petition are just and true, to the best of his knowledge and belief.

Sworn and subscribed before me this 5th day of April, A.D. 1909. } J. Jay Corson.

Abram D. Hallman,
Prothonotary.

DECREE:

And now, to-wit: April 5th, 1909, Citation awarded, returnable according to law.

By the Court.

Aaron S. Swartz, P.J.

CITATION.

Excelsior Savings Fund and Loan Association	}	No. 13,
v. Edgar A. Ruthman, et al.		March Term, 1909.

Montgomery County, ss:

The Commonwealth of Pennsylvania,

To J. A. Cookes and Cookes, his wife,

GREETING:

We command you, that laying aside all business and excuses whatsoever, you be and appear in your proper person at a Court of Common Pleas, to be held at Norristown, in and for said county, at the expiration of fifteen days from the service of this Citation upon you, to answer the petition of J. Jay Corson, filed in open Court, on April 5th, 1909, and to show cause, if any you have, why possession of certain premises (being all that certain plantation with the messuage thereon erected, situate in the Township of Lower Providence, County of Montgomery, and State of Pennsylvania, Containing Sixty Acres of land, more or less, with exception of a tract of 24.79 acres, and fully described in the copy of the Petition

served herewith), which were purchased at a Sheriff's sale on February 17th, A.D. 1909, by said J. Jay Corson, should not be delivered to the said J. Jay Corson, and further to abide the order of the Court in the premises.

Hereof fail not.

Witness the Hon. Aaron S. Swartz, President Judge of our said Court at Norristown, this Fifth day of April, A.D. 1909.

Abram D. Hallman,
Prothonotary.

RETURN OF THE SHERIFF.

Montgomery County, ss:

C. J. Buckley, being duly affirmed, according to law, deposes and says that he served the within Citation on J. A. Cookes, within-named, by handing, April 6th, 1909, a true and attested copy of the same, together with a copy of the Petition filed in cause, to an adult member of his family at his dwelling house, said adult being Emma Mispel Lorn, his housekeeper, and said J. A. Cookes being in possession of the within-described premises, and by handing, eo die, a like copy of writ and petition to Emma Mispel Lorn, personally, she being the housekeeper for said J. A. Cookes.

Non Est Inventus as to Cookes, his wife.

Affirmed and subscribed before me this 6th day of April, A.D. 1909.	}	C. J. Buckley, Sheriff.
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Louis M. Kelty,
Deputy Prothonotary.

Petition for Appointment of Commissioner to Make an Enrollment of the Inhabitants of a Township with a View of Finding Whether the Same is at Least 300 to the Square Mile, Under the Act of Assembly of March 24, 1909, P. L. No. 32.

To the Honorable, the Judges of the Court of Quarter Sessions of the Peace of Montgomery County, Pennsylvania:

The Petition of the undersigned owners of twenty-five per centum. of the assessed valuation of the real estate of the Township of Limerick, said county,

RESPECTFULLY REPRESENTS:

That the population of the Township of Limerick, County of Montgomery, Pa., has become and is at least 300 to the square mile, and in all things submitting themselves to the action of said Court, do hereby pray that your Honors appoint a competent commissioner to make an enrollment of the inhabitants of said township and to report the said enrollment, with the finding of the population thereof, during the next ensuing term of said Court.

And they will ever pray, etc.

John Doe, &c.

State of Pennsylvania,
County of Montgomery, ss:

John Doe, being duly affirmed according to law, doth depose and say that the facts set forth in the fore-

going Petition are true and correct to the best of his knowledge and belief.

Affirmed and subscribed to
before me, this 29th day
of April, A.D. 1909. } John Doe.

MONTGOMERY LINDERMAN,
Justice of the Peace.
Commission expires first Monday of May, 1911.

Fees of Constables, Established Under Act of
February 17, 1899, P. L. 3

CIVIL CASES.

Serving summons, for each person served.....	\$.50
Serving subpoena, first witness.....	.50
Serving subpoena, each additional witness.....	.15
Serving attachment, each defendant and garnishee served	.50
Arresting on capias, each person.....	1.00
Taking bail on capias.....	.50
Delivery of goods.....	.50
Notifying plaintiff, where defendant has been arrested on capias (to be paid by plaintiff).....	.25
Serving execution	.50
Serving execution, capias.....	1.00
Making return, nulla bona or non est inventus.....	.25
Taking inventory of goods on execution, each item.	.02
Holding appraisement for exemption claimed by defendant, out of which he shall pay each appraiser \$1.....	4.00
Serving scire facias, either personally or by leaving copy, each person.....	.50
Serving notices to referees and suitors, each person served	.50

Levying goods on execution.....	.50
Selling goods on execution, each dollar not exceeding \$100.....	.03
Selling goods on execution, each dollar in excess of \$100	.02
Receiving and paying over money paid after levy, but before sale on each dollar actually received, and paid by constable to creditor.....	.02
Advertising goods levied on.....	1.00
Copy of vendue paper when demanded, each item..	.02

CRIMINAL CASES.

Executing warrant, each defendant.....	\$1.00
Conveying defendant to jail, except vagrants on mittimus or warrant.....	1.00
Conveying each additional defendant.....	.50
In addition thereto, actual costs of transportation of defendants:	
Arresting persons guilty of breach of peace.....	.75
Arresting persons guilty of riotous or disorderly conduct	.75
Arresting persons guilty of drunkenness.....	.75
Arresting persons engaged in the commission of an act tending to imperil personal security or endanger the property of citizens.....	.75
Arresting persons guilty of violating any ordinance of any borough for which a fine or penalty is imposed	.75
Arresting persons guilty of offending or suspected of offending, against the laws of this Commonwealth, protecting timber lands.....	.75
Arresting persons guilty of the violation of any other law of this Commonwealth, authorizing arrest by constable without process and bringing	

such offender before a justice of the peace.....	.75
Every act in or about the arrest or commitment of vagrants, each, together with mileage (see miscellaneous)	.75
Levying a fine or forfeiture on warrant.....	.50
Taking body of defendant into custody on mittimus, where bail is afterwards entered before delivery of body to jailor.....	1.00
Executing bail piece.....	1.00
Executing search warrant and making return thereon	1.00
Serving subpoena, first witness.....	.50
Serving subpoena, each additional witness.....	.15

LANDLORD AND TENANT.

Executing landlord's warrant.....	\$.50
Taking inventory of goods, each item.....	.02
Levying or distraining goods.....	.50
Serving notice on tenant.....	.50
Selling goods levied or distrained, each dollar, not exceeding \$100	.03
Selling goods levied or distrained, each dollar, in . excess of \$100.....	.02
Receiving and paying over money paid after levy, without sale, each dollar actually received and paid over to creditor.....	.02
Adv. sale of goods, levied or distrained.....	1.00
Copy of vendue paper, when demanded, each item..	.02
Putting up notice of distress at mansion house or at any other place on the premises.....	.25
Executing writ of restitution.....	2.00
Executing writ of possession.....	2.00
Serving summons in landlord and tenant pro- ceedings	.50

Holding appraisalment when exemption is claimed
 out of which constable shall pay to each
 appraiser \$1..... 4.00
 Appraisalment of goods distrained is not provided for,
 and would seem to be a "similar" service to this.

MISCELLANEOUS.

Making return to Court of Quarter Sessions.....\$1.50
 Making return to Court of Quarter Sessions, under
 Act of April 23, 1909..... 2.50
 Executing order of removal of pauper..... .75
 Attending elections, general, special, township, ward
 or borough, which includes notices in writing
 to persons elected in special, township, ward or
 borough elections 3.00
 Under Act of April 23, 1909, each additional, for
 service of notice..... .15
 When the township, ward or borough is divided into
 election districts, the deputy constable of each
 shall receive 3.00
 Mileage from constable's residence or when he
 receives paper to point by route usually traveled
 each mile, going and returning..... .06
 For services not specified, same as for similar ser-
 vices.

Fees of Justices of the Peace, Aldermen and Magis-
 trates, Established Under the Act of April 23, 1900.

(This Act does not apply to Justices elected or appointed
 at the time of its passage.)

CIVIL CASES.

Entering action\$.30
 Issuing summons, one name..... .30

Issuing summons, each additional name.....	.10
Issuing summons, attested copy.....	.30
Subpoena	.30
Subpoena, each additional name.....	.10
Subpoena, duces tecum.....	.30
Entering return of summons.....	.30
Qualifying constable to return.....	.25
Entering bail when required.....	.50
Every continuance	.25
Trial and judgment.....	.75
Administering oath	.10
Entering satisfaction	.20
Entering discontinuance	.20
Ent. am., suit or confession of judgment.....	.60
Ent. rule to take deposition.....	.40
Interrogatories attached to rule.....	.30
Ent. return to rule to take deposition.....	.30
Ent. return to rule of reference.....	.30
Issuing rule of reference.....	.40
Notice to each referee and copy.....	.35
Ent. report of reference and judgment thereon.....	.75
Written notice in any case.....	.25
Execution and return.....	.60
Scire Facias	.30
Return on Scire Facias.....	.30
Opening judgment for re-hearing.....	.30
Making transcript of judgment and certificate.....	.75
Return of proceedings on appeals, including aff. bail and ctf.....	1.50
Return of proceedings on certiorari, including aff. bail and ctf.....	1.50
Receiving amount of judgment, and paying over, not over \$10.....	.25
Over \$10, and not over \$40.....	.50
Over \$40, and not over \$60.....	.75
Over \$75, and not over \$100.....	1.00
Like amount on each additional \$100 or fraction thereof	
Entering transcript of judgment from another jus-	

tice or alderman.....	.75
Probating accounts	.50
Copy of claim in suit under Act of 1879.....	.50
Affidavit of defence.....	.50

CAPIAS.

Capias, one name.....	\$.50
Capias, each additional name.....	.10
Entering return	.30
Entering bail	.50

CRIMINAL CASES.

Information or complaint, one defendant.....	\$.50
Information or complaint, each additional defendant	.10
Warrant on behalf of Commonwealth, one defendant	.50
Each additional defendant.....	.10
Docket entry	.50
Administering oath	.10
Entry of confession or plea of guilty.....	.50
Hearing, each day, or fraction thereof.....	.75
Taking bail for hearing or appearance at Quarter Sessions, each defendant.....	.50
Bail-piece and return.....	1.00
Commitment	.50
Discharge to jailor.....	.50
Entering discontinuance	.50
Transcript and certificate.....	.75

CAPIAS.

Capias on behalf of Commonwealth, one defendant..	\$.50
Capias on behalf of Commonwealth, each additional defendant	.10
Return of capias.....	.30

SUMMARY CONVICTION CASES.

Information or complaint, one defendant.....	\$.50
Information or complaint, each additional defendant	.10
Docket entry	.50
Issuing summons, one defendant.....	.30
Issuing summons, each additional defendant.....	.10
Issuing summons, attested copy.....	.30

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Issuing warrant, one defendant.....	.50
Issuing warrant, each additional defendant.....	.10
Issuing subpoena	.30
Issuing subpoena, each additional name.....	.10
Issuing subpoena, duces tecum.....	.30
Hearing, each day, or fraction thereof.....	.75
Taking entry of testimony, each witness.....	.25
Entering judgment on conviction for fine.....	.50
Recording conviction	.25
Recording sentence	.25
Warrant to levy fine of forfeiture.....	.50
In conviction under city, borough or township ordinance, heard and disposed of, and costs not paid by defendant, city, borough or township, treasurer to pay.....	2.00
In conviction, heard and disposed of, to be paid by county (if under Act of Legislature).....	2.00

Provided that this shall not apply to the payment of costs in Summary Conviction Cases that are now or may hereafter be otherwise provided for.

ATTACHMENT.

Affidavit	.50
Entering action	.30
Attachment and attested copy.....	.75
Entering return of attachment.....	.30
Rule on garnishee.....	.40
Interrogatories, filing and issuing.....	.50
Return rule on garnishee.....	.30
Return of interrogatories.....	.30
Bond	.75

LANDLORD AND TENANT PROCEEDINGS.

Entering complaint	\$.75
Issuing process	.75
Hearing and determining case.....	1.00
Recording proceedings	1.50
Writ of possession and return.....	1.00
Issuing venire to summon jury, and return.....	1.00
Holding trial by jury and entering judgment.....	2.00

STRAYS (Action On.)

Information	\$.50
Warrant to freeholders to appraise damage.....	.50
Receiving and entering return of appraisers and judgment thereon	.75
Publishing proceedings of appraisers, not including cost of printing	.50

POOR LAWS.

Order for relief of pauper.....	\$.50
Order for removal of pauper.....	.50
Order to seize goods for maintenance of wife or children	.50

MISCELLANEOUS.

Order for premium for wolf, fox or other scalps, payable by county.....	\$.50
Certificate to obtain land warrant.....	1.00
Marrying each couple, record and ctf.....	5.00
Swearing or affirming county, township or other public officer, each.....	.50
Writing affidavits or affirmations.....	.50
Justifying parties on liquor bond.....	1.50
Appointing freeholders	.50
Order to sell goods in any case.....	.50
Acknowledgements, first name.....	.50
Acknowledgements, each additional name.....	.25

FEES FOR SERVICES UNDER LAWS OF THE UNITED STATES.

Certificate of protection.....	\$.50
Certificate of lost protection.....	.25
Warrant	.25
Commitment	.25
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